01-1345

STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 01-1345-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

Trial Court Case
No. LC 98CF708

vs.

PAUL J. STUART

Defendant-Appellant-Petitioner

APPEAL FROM ORDER DENYING POSTCONVICTION RELIEF DATED APRIL 11, 2001, AND JUDGMENT OF CONVICTION DATED MAY 17, 1999, ENTERED IN THE KENOSHA COUNTY, WISCONSINM CIRCUIT COURT, JUDGE MICHAEL S. FISHER, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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2. Whether this court, pursuant to Crawford v. Washington, should reverse the defendant-appellant-petitioner's conviction in the above matter due to the limited cross-examination of John Stuart at the preliminary hearing?

3. Whether the U.S. Supreme Court's decision in Crawford v. Washington should be applied retroactively to the defendant-appellant-petitioner's case?

STATEMENT OF THE CASE

The petitioner, Paul J. Stuart, was convicted of first degree murder after a jury trial which began on January 8, 1999 and was adjudged guilty by a jury on February 26, 1999 (R.82:1). Thereafter, the petitioner, Paul J. Stuart, filed a motion for postconviction relief with the trial court (96:1-58). The motion hearing was held on January 12, 2001, and the petitioner's motion for postconviction relief was subsequently denied on April 6, 2001 (100:1; 104:1; 106:1). Thereafter the petitioner filed a notice of appeal (107:1-2) After having completed briefing to the

Wisconsin Court of Appeals, the Wisconsin Supreme Court, upon the Court of Appeals motion, accepted certification of this appeal on December 11, 2002. On July 1, 2003, the Wisconsin Supreme Court affirmed and remanded for further proceedings to the Court of Appeals the petitioner's conviction in the case of State v.Paul J. Stuart, 2003 WI 73. The only issue cited by the Wisconsin Supreme Court dealt with the issue of the admissibility of John Stuart's preliminary hearing testimony. State v. Stuart, 2003 WI 73. In a decision and order dated December 10, 2003, the Court of Appeals affirmed the petitioner's conviction. (A.App.pp. 103-111). The defendant-appellant-petitioner, Paul J. Stuart, filed a petition for review of an adverse decision of the Court of Appeals with the Wisconsin Supreme Court on January 9, 2004.

Thereafter, the Wisconsin Supreme Court ordered the parties to address whether a recent decision of the United States Supreme Court entitled Crawford v. Washington, 541 U.S. _____ 158 L,Ed. 2d 177, 124,S.Ct. _____, had any impact on the defendant-appellant-petitioner's case (A. App. pp.101-102). In a decision and order of June 8, 2004, the Wisconsin Supreme Court accepted the defendant-appellant-petitioner, Paul J. Stuart's, petition for review

and ordered that the parties submit a brief to the Wisconsin Supreme Court addressing the impact of the U.S. Supreme Court's decision in Crawford v. Washington; the Wisconsin Supreme Court also requested that the parties address whether or not Crawford v. Washington should be applied retroactively to Paul J. Stuart's case (A.App. p. 102).

STATEMENT OF FACTS

On 8/13/98 a preliminary hearing was held in the case of State v. Paul J. Stuart, and the witness who testified against Paul J. Stuart was his brother, John Stuart (11:1-39). At that hearing, John Stuart testified that he had met the deceased, Gary Reagles, on two occasions (11:7). John Stuart became aware that Gary Reagles was found dead in his apartment when his brother, George Stuart, had told him that they had found Mr. Reagles dead (11:8). On that same day, John Stuart had spoken with his brother, Petitioner, Paul Stuart. He had spoken to him at his residence (11:9-10). Somewhere between 5:00 and 7:00 in the morning, Paul Stuart mentioned to John Stuart that he had been out partying with Gary Reagles earlier that evening. Paul Stuart stated that they were using cocaine and drinking (11:10-11). John Stuart further testified

that he had been doing the same thing that evening himself (11:11). He was, therefore, confused when Paul Stuart came over to see him earlier that morning (11:11).

At some point, Paul Stuart told John Stuart that he had shot Gary Reagles over an incident regarding a burglary (11:11). John Stuart also testified that both he and Paul Stuart had earlier committed a burglary in Illinois and that some coins, guns, a few pocket knives, and some regular change were recovered from that burglary (11:12). Some of the guns were retained in both Paul and John Stuart's possession (11:13). One of the guns was a 9 millimeter Baretta. Paul had possession of the 9 millimeter Baretta (11:13). Paul did not mention the 9 millimeter Baretta when speaking to John earlier that morning (11:13).

Paul appeared to John to be very confused, and very distraught the morning he told John that he had shot Gary Reagles. John testified that he thought Paul appeared confused because of all of the cocaine that he had been doing earlier that evening (11:14).

Next, Paul told John that Paul had fixed the crime scene wherein Gary Reagles had been shot to appear like a suicide (11:14). Later that same day, George Stuart, Paul

and John's other brother, came over and told the two of them that Gary Reagles had been found dead (11:14). Paul Stuart, according to John, appeared surprised when George told them of Reagles' death (11:14).

Next, John Stuart testified that Paul had asked him to provide an alibi for him for the shooting of Gary Reagles. That alibi was that Paul was at John's home (11:15).

At some point after the discovery of Gary Reagles' body, John Stuart testified that Paul left the state of Wisconsin and went to Arizona with their nephew, Arthur Parramoure (11:16-17).

Next, under cross examination, John Stuart testified that it was in 1992 or 1993 when he first gave this information over to a Detective Tappa of the Kenosha Police Department (11:17-18). Next, Paul J. Stuart's trial counsel asked John Stuart if he had also given a statement to Detective Tappa in June of 1998 regarding the death of Gary Reagles (11:18). John Stuart testified that he had given a statement to Detective Tappa in June of 1998 (11:18). Next, Paul Stuart's trial counsel asked John under what circumstance he gave the statement to Detective Tappa in June of 1998 (11:18). The district attorney objected to the question (11:18). The district attorney, Robert

Jambois, claimed that said question went to discovery, pertained to credibility, and not to plausibility (11:18). The court agreed with the district attorney's objection and sustained it (11:19).

After hearing the testimony of both John Stuart and Arthur Parramoure at the preliminary hearing held on August 13, 1998, the court commissioner bound over the Petitioner, Paul J. Stuart, for trial (11:37).

A jury trial commenced on February 8, 1999 (41). The first witness to testify for the State was Kimberly Renschin. Ms. Renschin was the girl friend of the deceased, Gary Reagles. Ms. Renschin testified that on the morning of March 26, 1990, Gary had been drinking either earlier that evening or that morning (41:68). Mr. Reagles also appeared to be upset as both Ms. Renschin and Mr. Reagles had decided to break up (41:68). Ms. Renschin also testified that Mr. Reagles had a gun with him that morning, and she told him that it scared her (41:68). Ms. Renschin left the apartment and returned later that day, around 2:00 o'clock, and saw Mr. Reagles there. Mr. Reagles was drunk when she returned and a gun was sitting up on the counter (41:69-70). Ms. Renschin left between 3:00 and 6:00 p.m.

(41:70).

On the morning of March 27th, Ms. Renschin had tried to get back into her apartment, went over to the vent and hollered for Gary but got no reaction from the apartment (41:74-75). Once she took the vent cover off, she saw Gary sitting in a chair. She called for him but did not get a reply (41:75-76). At about 3:00 o'clock, both Ms. Renschin and her girl friend called 911 (41:76).

Ms. Renschin also testified on cross that she had known Gary to attempt suicide in the past, and that he had written a letter to her that he wanted to die as well (41:84-87). Ms. Renschin further stated that on other occasions that Mr. Reagles stated to her that if he couldn't be with her any more, that he would kill himself (41:88). Ms. Renschin further testified that on the Monday afternoon in 1990 leading up to the death of Mr. Reagles, Mr. Reagles was very intoxicated, stated that he couldn't live without her, was waving a gun around and was threatening to kill himself (41:89). Ms. Renschin was very concerned for her safety at that point (41:89).

Officers Laudonio, Karpus and Morrissey were the first officers to arrive on the scene (41:107-108). Officer

Laudonio went through a window of Mr. Reagles apartment and unlocked the door (41:108). Next, Robert Karpus testified that fingerprints were never dusted for in the apartment of Gary Reagles on the date of his death (43:12). Further, that at the scene there was talk by Detective Kopeski that Mr. Reagles had committed suicide (43:45). Detective Kopeski also testified that he did not think it was necessary to dust for fingerprints at the time (43:13). Upon his examination of the scene, Detective Kopeski found that the position of Gary Reagles' hands was consistent with him having shot himself (43:79). No fingerprints were ever recovered on the weapon although one fingerprint was recovered on the magazine, and that fingerprint was Gary Reagles' (43:110-111).

A number of witnesses testified against Paul Stuart, and one of the witnesses against him was his brother, John (46:87). On Day 3 of the jury trial, John Stuart plead the Fifth Amendment when he was asked questions regarding the homicide and what he knew about the homicide of Gary Reagles. The State offered John Stuart use immunity for his testimony but John Stuart still plead the Fifth Amendment (46:88). It was John Stuart's recollection that the plea bargain he had received hinged upon him testifying

in this case (46:88). The State then asked the trial court permission to have John Stuart's preliminary hearing testimony read into the record, upon which Paul Stuart's attorney objected claiming that there was no effective cross examination of John Stuart allowed at the preliminary hearing (46:92). On direct examination of the State, after having heard John Stuart claim that he would plead the Fifth Amendment, John Stuart plead the Fifth Amendment before the jury (46:107).

At a motion hearing held on February 11, 1999, the trial court declared the preliminary hearing transcript of John Stuart inadmissible (50). An appeal was taken to the Wisconsin Court of Appeals and in an order dated February 16, 1999, the Court of Appeals affirmed the trial court's decision (54). Thereafter, an appeal was taken to the Wisconsin Supreme Court which reversed the Court of Appeals (63).

The jury trial resumed on February 17, 1999 and numerous witnesses for the State, including Arthur Parramoure, testified (56:23). Mr. Parramoure testified that Paul Stuart had made a statement to him during the course of a trip that the two of them had made to Arizona (56:24). Specifically, Art Parramoure testified that Paul

Stuart had told him that he shot Gary Reagles (56:24). Mr. Parramoure testified that Paul Stuart had shot Gary Reagles because Paul had been selling a gun to Mr. Reagles, and Mr. Reagles was trying to get money for the gun from Paul Stuart (56:24). Approximately one day after stating that he had shot Gary Reagles, Paul Stuart told Art Parramoure that he had been just "bullshitting" about Gary Reagles' death (56:25).

Other witnesses during the trial testified against Paul Stuart claiming that Paul Stuart had said that he had killed Gary Reagles. Said witnesses included Michael Schultz (56:44); David Small, who testified that Paul Stuart had told him that he shot a man and made it look like a suicide (56:65); Benjamin Woody, who overheard a conversation on October 5, 1998 that Paul Stuart said he killed him (56:102); and Damian Simpson, who stated that he overheard Paul Stuart tell another inmate that he had killed "the bastard" (56:138).

On Day 8 of the jury trial, the preliminary hearing transcript of John Stuart was read into the record (65:11-25). Numerous witnesses also testified for the defendant on that date. One of those witnesses was Miroslav Romanovic, who contradicted statements by some witnesses

who had stated that Paul Stuart said, during a Monday night football game, that he had killed Gary Reagles. Mr. Romanovic testified that he never heard Paul Stuart say he had killed Gary Reagles during that game (65:31). Robert J. Landerman III testified that he overheard Mr. Schultz, who had previously testified for the State, tell Paul Stuart that he had never signed any statements implicating Paul Stuart in Reagles' death (65:64). Scott Finley corroborated Landerman's testimony (65:68-72).

Next, Delores Frederico, Paul Stuart's mother, testified for the defense and testified that Paul Stuart had a non-violent character (65:91). The final witness of the defense was the Petitioner, Paul J. Stuart. Mr. Stuart testified on February 24 and February 25,1999 (65:67). Throughout his two days of testimony, Paul J.Stuart denied having killed Gary Reagles (65:117-158; 67). Finally, Paul Stuart testified the only reason he told Art Parramoure that he had shot Gary Reagles was that he was trying to scare Art (65:151). He wanted Mr. Parramoure to fear him so that Mr. Parramoure would treat his niece better (65:152).

On February 26, 1999, Paul J. Stuart was convicted of first degree intentional homicide after a 10-day jury trial

(69). Thereafter, Paul J.Stuart was sentenced to life in prison without the possibility of parole until 4/16/2029 (84).

ARGUMENT

I. PURSUANT TO CRAWFORD V. WASHINGTON, THE SIXTH AMENDMENT ALLOWS THE ADMISSION OF TESTIMONIAL EVIDENCE ONLY WHERE IT HAS BEEN DETERMINED THAT THE DECLARANT IS UNAVAILABLE, AND THE DEFENDANT HAS CROSS-EXAMINED THE WITNESS.

i. Ohio v. Roberts, 448 U.S. 56, is overruled to the extent that it held when a hearsay declarant is not present for cross-examination at trial his statement is admissible if it bears adequate indicia of reliability or there is a showing of particularized guarantees of trustworthiness.

The Sixth Amendment's Confrontation Clause provides that "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him". Crawford v. Washington. 541 U.S. _____ (2004). This bedrock procedural guarantee applies to federal and state prosecutions. Id. at 6, citing Pointer v. Texas, 380 U.S. 400, 406 (1965). An unavailable witness' out-of-court statement may be admitted so long as it has adequate indicia of reliability. Ohio v. Roberts, 448 U.S. 56, 66 (1980). Pursuant to Ohio v. Roberts, reliability therefore can be inferred in a case where the evidence falls within a

firmly rooted hearsay exception or bears particularized guarantees of trustworthiness. See Roberts, 448 U.S. at 66.

In Crawford v. Washington, 541 U.S. _____ (2004), the petitioner argued that the test in Ohio v. Roberts, 448 U.S. 56 (1980) that an unavailable witness' out-of-court statement may be admitted so long as it has adequate indicia of reliability, was contrary to the original meaning of the Confrontation Clause and urged the U.S. Supreme Court to reconsider it. See Crawford, 541 U.S. ____ at 6. The court in Crawford held that where testimonial evidence is at issue, the Sixth Amendment demands that where a witness is unavailable to testify at trial, there must be both a showing of unavailability and a prior opportunity for cross examination. See Crawford, 541 U.S. _____ at 33. Where testimonial statements are at issue, furthermore, the only indicia of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. Id. Ohio v. Roberts, 440 U.S. 56, was therefore overruled to the extent that it held when a hearsay declarant is not present for cross-examination at trial, his or her statement is

admissible if it bears adequate indicia of reliability or there is a showing of particularized guarantees of trustworthiness.

In overruling Ohio v. Roberts, the U.S. Supreme Court reasoned that the right to confront one's accusers is a concept dating back to Roman times. See Crawford, 541 U.S. _____ at 6, citing Coy v. Iowa, 487 U.S. 1023, 1015 (1988); Herrmann & Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l L.481 (1994). In reviewing the history of the Sixth Amendment, two inferences about that meaning was apparent to the U.S. Supreme Court.

First, the principal evil at which the confrontation clause was directed was the civil law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against an accused. See Crawford, 541 U.S. at 14. Accordingly, the U.S. Supreme Court "once again reject [ed] the view that the Confrontation Clause applies of its own force only to in-court testimony, and its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being'" Id. citing 3 Wigmore, §1397, at 101; accord, Dutton v. Evans, 400 U.S. 74, 94 (1970). Although not all hearsay

implicates the Sixth Amendment core concerns, ex parte examinations would not be condoned by the Framers of the U.S. Constitution. 541 U.S. ____ at 15. The text of the Confrontation Cause reflects the focus of the Framers as it applies to witnesses against the accused, in other words, those who bear testimony against the accused. Id. In sum, even if the Sixth Amendment was not solely concerned with testimonial hearsay, according to the U.S. Supreme Court that is its primary object (Emphasis added). See Crawford, 541 U.S. _____ at 17.

A second historical proposition in the historical record regarding the meaning of the Sixth Amendment, according to the Crawford case, is that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the accused had a prior opportunity for cross-examination. 541 U.S. ____ at 17-18. The text of the Sixth Amendment did not suggest to the Court any open-ended exceptions from the confrontation requirement to be developed by the courts. Id. Rather, the right to be confronted with the witnesses against him, is a reference to the right of confrontation at common law, admitting only those exceptions established at the time of

the founding. See Crawford, 541 U.S.____ at 18. The English authorities revealed to the Court that the common law in 1791 conditioned admissibility of an absent witness' examination on unavailability, and a prior opportunity to cross-examine the witness. The Sixth Amendment therefore incorporated those limitations, according to Crawford. 541 U.S. ____ at 18.

The Court in Crawford therefore did not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. See Crawford, 541 U.S. ____ at 20. The historical sources suggested that this requirement was dispositive and not merely one of several ways to establish reliability. Id. There was scant evidence to suggest to the Court, furthermore, that exceptions were invoked to admit testimonial statements against an accused in a criminal case. Id. The court in Crawford therefore could not infer that the Framers thought exceptions would apply even to prior testimony (Emphasis added). Id. citing Lilly v. Virginia, 527 U.S. 116, 134 (1999).

Accordingly, case law had been consistent with these two principles. See Crawford, 541 U.S. ____ at 21. Cases

of the U.S. Supreme Court have thus remained faithful to the Framers' understanding that testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross examine. See Crawford, 541 U.S. ____ at 23.

According to Crawford however, although the results of the U.S. Supreme Court's decisions had generally been faithful to the original meaning of the Confrontation Clause, the rationales behind those results had not. See Crawford, 541 U.S. ____ at 24. Citing to Ohio v. Roberts, wherein Roberts conditioned the admissibility of all hearsay evidence on whether it fell under the "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness", the Court in Crawford held that this test departed from the historical principles identified previously in two respects. First, it was too broad as it applied to the same mode of analysis whether or not the hearsay consisted of ex parte testimony. See Crawford, 541 U.S. _____ at 24-25. At the same time, however, the test was too narrow as it admitted statements that consist of ex parte testimony upon a mere finding of reliability. Id. This standard often failed to protect

against "paradigmatic confrontation violations." See Crawford, 541 U.S. ____ at 25.

Where testimonial statements are involved, therefore, the U.S. Supreme Court did not think that the Framers meant to leave the Sixth Amendment's protection to the "vagaries of the rules of evidence, much less to amorphous notions of reliability". See Crawford, 541 U.S. ____ at 25-26. Admitting statements deemed reliable by a judge was fundamentally at odds with the right of confrontation. Id. at 26. As the Clause's ultimate goal is to ensure reliability of evidence, that reliability can only be assessed in a particular manner: by testing it in the crucible of cross examination. Id. at 26. As the Ohio v. Roberts test allows a jury to hear evidence, "untested by the adversary process, based on a mere judicial determination of reliability", it thus "replaces the constitutionally prescribed method of assessing reliability, with a wholly foreign one." Id. Dispensing with confrontation therefore because testimony was obviously reliable, is similar to dispensing with a jury trial because a defendant is obviously guilty. See Crawford, 541 U.S. ____ at 27. According to the Court, this is not what the Sixth Amendment prescribed. Id.

The legacy of Ohio v. Roberts' framework therefore, was so unpredictable that it failed to provide any meaningful protection from core confrontation violations. See Crawford, 541 U.S. ____at 27. **Inculpatory statements given in a testimonial setting therefore is the trigger that makes the Confrontation Clause's demands most urgent.** Id. at 30. As the Supreme Court in Crawford concluded, it is not enough to point out that most of the usual safeguards of the adversary process attend a statement when the single safeguard missing is that **which the Confrontation Cause demands: the right to cross-examine one's accusers.** (Emphasis added) Id. at 30.

Given the above analysis , the U.S. Supreme Court in Crawford concluded that where testimonial evidence is at issue, the Sixth Amendment demands what the common law required: unavailability and prior opportunity for cross-examination. See Crawford, 541 U.S. ____ at 33. Although the Court left for another day, a comprehensive definition of what constitutes testimonial evidence, it ruled that at a minimum it applies to prior testimony at a preliminary hearing. (Emphasis added) Id. Therefore, where testimonial statements are at issue, the only "indicium of reliability sufficient to satisfy constitutional demands is

the one the Constitution actually prescribes: confrontation". See Crawford, 541 U.S. ____ at 33. As such, the judgment of the Washington Supreme Court was reversed, and the case remanded for further proceedings. Id.

A. How Crawford v. Washington applies to Paul Stuart's case.

The Wisconsin Supreme Court in State v. Paul Stuart, 2003 WI 73 held that John Stuart's preliminary hearing testimony was admissible. As an initial starting point, much of the Wisconsin Supreme Court's decision dealt with the "law of the case" doctrine. As a final point of discussion on the law of the case doctrine, this Court had the opportunity to determine whether or not it should find an exception to the "law of the case" doctrine in Paul J. Stuart's case. See State v. Paul J. Stuart, 2003 WI 73, ¶29. Such exceptions included whether or not there existed "cogent, substantial, or proper reasons" to put aside the law of the case application, such as substantially different evidence, **new case law or some sort of miscarriage of justice stemming from a prior ruling**. Id. The Supreme Court found that no such circumstances existed in State v. Stuart, 2003 WI 73, as nothing in Mr. Stuart's

case had changed.

However, something has changed in Mr. Stuart's case for this Court to re-examine the "law of the case" doctrine. Specifically, new case law now exists in the form of Crawford v. Washington, 541 U.S. ____ (2004). As discussed above, Crawford has substantially changed the case law regarding the Confrontation Clause. Given this Court's decision in State v. Paul J. Stuart, 2003 WI 73, regarding the admissibility of John Stuart's preliminary hearing testimony, this Court's decision is ripe for re-review.

In Stuart, this Court looked to the purpose behind the Confrontation Clause and cited to the case of State v. Bauer, 109 Wis. 2d 204 (1982). As the Court stated in Stuart, although the rule of confrontation is very important, it is not absolute. If the Confrontation Clause were "held absolute, virtually all evidence admissible under a hearsay exception would violate the Confrontation Clause." See Stuart at ¶32. As stated in Bauer, 109 Wis. 2d 204, this Court established a test for determining when hearsay evidence is admissible without violating a defendant's constitutional right to confrontation. Id. at

¶33. The first step is to determine whether the evidence fits within any recognized hearsay exception. Id. at ¶34. Former testimony, such as John's preliminary hearing testimony, fell within 908.045, Stats. Although John's testimony qualified as former testimony, the question that remained was whether John's preliminary hearing testimony met the requirements of 908.045, Stats. Id. at ¶34. This Court believed that it did. As the testimony was given at a preliminary hearing in which the defendant was given an opportunity to develop the testimony by direct, cross, or re-direct examination, this Court felt that the testimony of John Stuart was admissible. Id. at ¶35. This Court held that to be the case even though it recognized that the scope of cross examination is limited by the scope of preliminary hearings. Id. Paul J. Stuart has argued that because he was not allowed to ask the circumstances under which John Stuart made his June statement to the police implicating his brother in the homicide, Paul J. Stuart's constitutional right to confrontation was violated. Id. at ¶38. The question by Paul J. Stuart's defense counsel regarding the circumstances of John Stuart's June statement drew an objection during cross-examination. The trial

court had ruled that the question related to credibility and discovery, and was beyond the scope of testimony allowed at a preliminary hearing. Id.

Acknowledging that preliminary hearings are not the same as full trials, because cross-examination at a preliminary hearing is limited to the issue of probable cause, this Court ruled that the fact that Paul J. Stuart was able to challenge his witness' veracity in cross-examination, and that further only one objection was sustained during the cross-examination, that Paul J. Stuart's right to confrontation was therefore not violated. (Emphasis added) Id. at ¶51.

This Court did acknowledge, however, that unlike some cases, John Stuart's credibility was an important issue to Paul J. Stuart's case. Id. at ¶51. The important point, however, comes in the following sentence which the Wisconsin Supreme Court used to justify its ruling in State v. Stuart, 2003 WI 73:

> However, John's testimony at the preliminary hearing and the circumstances surrounding it was sufficient to satisfy the requirement that there be **indicia of reliability**. See Stuart at ¶51.

One of the bases that this Court found to conclude that John's testimony at the preliminary hearing met the

requirement of "indicia of reliability" was that his defense counsel was "able to meaningfully cross-examine John." Id. at ¶51. However, this Court also acknowledged the fact that "Unlike some cases, John's credibility was an important issue in the case". Id. Given the importance of John, however, this Court still found John's testimony at the preliminary hearing sufficient to satisfy the "indicia of reliability" requirement. Id.

It is Paul J. Stuart's contention that given the U.S. Supreme Court's decision in Crawford v. Washington, 541 U.S. _____ (2004), that a statement is no longer admissible if it bears adequate indicia of reliability and the witness if unavailable, the fact that this Court relied upon the "indicia of reliability" requirement when deciding that John's testimony at the preliminary hearing was admissible, requires this Court to re-examine and overrule its opinion in State v. Paul J. Stuart, 2003 WI 73. As the U.S. Supreme Court in Crawford concluded where testimonial statements (preliminary hearing testimony) are at issue, **the only indicia of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation**, the only indicia of reliability

sufficient in Paul J. Stuart's case to satisfy his constitutional right of confrontation is allowing a full cross-examination of John Stuart (Emphasis added).

As this Court acknowledges, John's credibility was an important issue in this case. See Stuart at ¶51. The circumstances under which John made his June statement to the police, which the trial court ruled was inadmissible as it related to John's credibility, denied Paul J. Stuart's right of confrontation regardless of the rest of the testimony John Stuart gave at the preliminary hearing, and regardless if that testimony had certain "indicia of reliability." The circumstances under which John Stuart gave his statement to the police in June of 1998 are as follows: (a) the state granted John Stuart immunity for his testimony; (b) the Illinois State's Attorney granted John Stuart immunity from a burglary that he had previously committed; (c) John Stuart agreed to cooperate and gave a statement on April 21, 1998 while sitting in jail; (d) John Stuart continued to cooperate and gave a statement on June 1, 1998, one day before he was to appear in Kenosha County Circuit Court to enter pleas in the case where he faced 52 years in prison; (e) the State filed an amended Information in that case the next day, June 2, 1998 which amended

Information cut John Stuart's exposure by 40 years from 52 to 12 years; (f) John Stuart was behind bars during this time; (g) all of these actions took place prior to John Stuart's testimony at his brother's preliminary hearing; and (h) John Stuart believed he had a plea agreement with the prosecution and the prosecution did not honor it (46:62;63:88; 96; Exhibits A-G).

Failure of the jury, therefore, to hear about the possible charges pending against John Stuart and his possible motivation to lie at the preliminary hearing, was prejudicial to the defendant-appellant-petitioner, Paul J. Stuart's case. The State in fact conceded the importance of John Stuart's preliminary hearing testimony in its closing statement to the jury when it stated **the most important testimony of all came from John Stuart and Art Parramoure** (Emphasis added) (67:129-130). As such, the inclusion of John's preliminary hearing testimony at trial is not harmless error. Delaware v. Van Arsdale, 475 U.S. 673, 684 (1986). The concession by the State of such an important issue in its closing argument is not harmless error and likely contributed to the conviction of Paul J. Stuart. Id.

The Court of Appeals in its decision reasoned that

because the preliminary hearing in Paul J. Stuart's case was not held until August 13, 1998, all the charges had been fully resolved at the time of John Stuart's preliminary hearing testimony (A.App. p.107). Therefore, according to the Court of Appeals, because the preliminary hearing was not held until August, 1998, the charges could not have provided an incentive for John Stuart to lie at the preliminary hearing falsely accusing his brother of murder (A.App. 107).

However, the Court of Appeals fails to point out that John Stuart agreed to cooperate and gave a statement to detectives on April 21, 1998 while sitting in jail. The Illinois State's Attorney granted John immunity for a burglary in Illinois in return for his statement about Reagles' murder. Further, that John Stuart continued to cooperate when he gave a statement on June 1, 1998, one day before he was to appear in Kenosha County Circuit Court to enter pleas in a case where he faced 52 years in prison. Third, that the State filed an amended Information in that case the next day, June 2, 1998, which cut John Stuart's exposure by 40 years, from 52 to 12 years. Finally, that all of these actions took place prior to John Stuart's testimony at his brother's preliminary hearing (46:62;

63:88; 96: Exhibits A-G). Therefore, in spite of the Court of Appeals' contention that because all of the charges against John Stuart were resolved by the time of the preliminary hearing and the charges, therefore, could not have provided an incentive for John Stuart to lie at the preliminary hearing, the point of Petitioner, Paul J. Stuart's argument, is that all of these charges against John Stuart were amended after he gave the statement to detectives on April 21 and June 1, 1998, and after he agreed to cooperate with detectives, and prior to an amended Information being filed on June 2, 1998 (Emphasis added). Is this mere coincidence?

Whether or not the charges were still pending on August 13, 1998, therefore, is completely irrelevant. The jury should have known about the circumstances surrounding John Stuart's statement to detectives on April 21 and June 1, 1998 which culminated in his preliminary hearing testimony on August 13, 1998. As the Court in State v. Delgado, 194 Wis. 2d 750, 752(1995) concluded, the particular importance of searching cross-examination of witnesses who have substantial incentive to cooperate with the prosecution does not depend upon whether or not some deal in fact exists between the witness and the

government(Emphasis added). Pursuant to Delgado, therefore, the circumstances surrounding John Stuart's statement to detectives on April 21 and June 1, 1998 was admissible evidence of a deal between John Stuart and the State. See Delgado, 194 Wis. 2d at 753. As the U.S. Supreme Court held in Crawford v. Washington, 541 U.S. ____(2004), that the only indicia of reliability sufficient to satisfy constitutional demands is a defendant's right to confront his accusers, and given that Paul J. Stuart was denied the right to cross examine John at trial regarding the circumstances surrounding his June, 1998 statement to the police and whether or not John had a deal with the State in return for such statement, it is Paul J. Stuart's contention therefore that he was denied his constitutional right to confront his accusers. As Paul J. Stuart, therefore, was not given a full opportunity to cross-examine John Stuart at the preliminary hearing as to the circumstances surrounding his June, 1998 statement to the police, the preliminary hearing testimony of John Stuart should have been excluded from trial. Crawford v. Washington, 541 U.S. ____ at 33.

Finally, as the Court of Appeals found, John first incriminated Paul Stuart in the Reagles murder in 1992 when he told the police that he believed Stuart had murdered Reagles. (A. App. p. 107) Although John had implicated his brother six years later, his 1992 accusation was made before John faced his criminal charges which Stuart claims should have been evidence of John's bias. (A.App. p. 107).

Again, as John Stuart was unavailable at trial and given that his statement to the police in 1992 was "testimonial evidence" as the Court in Crawford has held, the fact that John was not cross-examined as to the 1992 statement at trial violated Paul Stuart's right to confront his accusers as well. See Crawford v. Washington, 514 U.S. _____ (2004).

Given that all evidence was excluded by the trial court at the preliminary hearing regarding the circumstances surrounding the statement John Stuart made to detectives in June, 1998, Paul J. Stuart was denied the right to a fair trial and denied the right to fully confront his accusers when John Stuart's preliminary hearing testimony was admitted at trial. See Crawford v. Washington, 541 U.S. _____, 158 L.Ed.2d 177 (2004).

II

THE U. S. SUPREME COURT'S DECISION IN CRAWFORD V. WASHINGTON IS RETROACTIVELY APPLIED TO PAUL J. STUART'S CASE

A new rule of substantive criminal law is presumptively applied retroactively to all cases, whether on direct appeal or on collateral review. State v. Lagundoye, 2004 WI 4, ¶12, 268 Wis. 2d 77, 88, citing Bousley v. United States, 523 U.S. 614, 620-21 (1998). Second, Wisconsin follows the federal rule announced in Griffith v. Kentucky, 479 U.S. 314, 328 (1987), that new rules of criminal procedure are to be applied retroactively to all cases pending on direct review or non-finalized cases still on the direct appeal pipeline. Id. at ¶12, citing State v. Koch, 175 Wis. 2d 684, 694, 499 N.W. 2d 152 (1993). Substantive law, furthermore, is that which declares what acts are crimes and prescribes the punishment therefore; whereas, procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished. Id. at ¶21, citing E.B. v. State, 111 Wis. 2d 175, 189, 330 N.W. 2d 584 (1983). A case is considered final if the prosecution is no longer pending, a judgment or conviction has been entered, the right to a state court appeal from a final judgment has been

exhausted, and the time for certiorari review in the United States Supreme Court has expired. Id. at ¶20, citing State v. Horton, 195 Wis. 280, 284 n.2 (1995); Koch, 175 Wis. 2d at 694 n.3.

When addressing the issue retroactivity as it applies to Paul J. Stuart's case, this Court must first ask whether or not the U.S. Supreme Court's decision in Crawford v. Washington, was one of substantive law or procedural law. See Lagundoye, 2004 WI 4, ¶21. Upon a review of the case law, the decision to admit testimonial (preliminary hearing) evidence at a trial is a law which provides or regulates the steps by which one who violates a criminal statute is punished. See Lagundoye at ¶21. The U.S. Supreme Court's decision in Crawford v. Washington, therefore, was one of procedural law. Id.

Second, this Court must ask whether or not this rule of criminal procedure as outlined in Crawford v. Washington should be applied retroactively to Mr. Paul J. Stuart's case. A new rule of criminal procedure is to be applied retroactively to all cases pending on direct review or to a non-finalized case still in the direct appeal pipeline. Id. at ¶12, citing Koch, 175 Wis. 2d at 694. In Mr. Stuart's case, his right to a state court appeal has not been

exhausted as he has petitioned this Court to review an adverse decision of the Court of Appeals. As such, the U.S. Supreme Court's decision in Crawford v. Washington is to be applied retroactively to his case. See Lagundoye, at ¶12; State v. Koch, 175 Wis. 2d 684, 694 (1993); Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

CONCLUSION

First, Crawford v. Washington, should be applied retroactively to the defendant-appellant-petitioner, Paul J. Stuart's case. Second, given that the defendant-appellant-petitioner, Paul J. Stuart, was denied the opportunity to fully cross-examine John Stuart at the preliminary hearing, and further given that the admission of John Stuart's preliminary hearing testimony at the defendant-appellant-petitioner's trial was not harmless error, the defendant-appellant-petitioner respectfully requests that this Court reverse his conviction.

Dated this 23rd day of June, 2004.

ROSE & ROSE
Attorneys for Defendant-
Appellant-Petitioner

By_____
CHRISTOPHER W. ROSE
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5529-6th Avenue
Kenosha,WI 53140
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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

> Typewritten (pica, 10 spaces per inch, non-Proportional font, double-spaced, 1-1/2 inch margins on left and 1 inch on other three sides)

The length of the Brief is 33 pages.

Dated this 23rd day of June, 2004.

Signed,

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STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 01-1345-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

Trial Court Case
No. LC 98CF708

vs.

PAUL J. STUART

Defendant-Appellant-Petitioner

APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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Supreme Court of Wisconsin
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June 8, 2004

To:

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Kenosha, WI 53140

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You are hereby notified that the Court has entered the following order:

No. 01-1345-CR State v. Stuart L.C.#98CF708

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Paul J. Stuart, and considered by this court;

IT IS ORDERED that the petition for review is granted; that pursuant to Wis. Stat. § (Rule) 809.62, within 30 days after the date of this order the defendant-appellant-petitioner must file a brief in this court; that within 20 days of filing the plaintiff-respondent, State of Wisconsin, must file either a brief or a statement that no brief will be filed; and that if a brief is filed by the plaintiff-respondent, within 10 days of filing the defendant-appellant-petitioner must file either a reply brief or a statement that no reply brief will be filed; and

IT IS FURTHER ORDERED that in any brief filed in this court the parties shall not incorporate by reference any portion of their court of appeals' brief or petition for review or

(Continued on Page Two)

response; instead, any material in these documents upon which there is reliance should be restated in the brief filed in this court; and

IT IS FURTHER ORDERED that the first brief filed in this court must contain, as part of the appendix, a copy of the decision of the court of appeals in this case; and

IT IS FURTHER ORDERED that within 30 days after the date of this order, each party must provide the clerk of this court with 10 copies of the brief previously filed on behalf of that party in the court of appeals; and

IT IS FURTHER ORDERED that the allowance of costs, if any, in connection with the granting of the petition will abide the decision of this court on review.

IT IS FURTHER ORDERED that the issue this court will review is limited to the one the parties addressed in their supplemental petition and response--i.e., the impact, if any, Crawford v. Washington has on this case; the parties shall also address the question of whether Crawford v. Washington should be applied retroactively to this case. This court will not renew the issues listed by the petitioner in his initial petition for review filed in this matter on January 9, 2004.

Cornelia G. Clark
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1345-CR Cir. Ct. No. 98-CF-708

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAUL J. STUART,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Paul J. Stuart appeals from a judgment convicting him of first-degree intentional homicide in the 1990 shooting death of Gary Reagles and from an order denying his postconviction motion seeking a new trial. We reject all of Stuart's appellate issues and affirm.

¶2 Stuart first argues that the circuit court erred in admitting at trial the preliminary hearing testimony of his brother, John Stuart, who implicated Stuart in the shooting. This issue was addressed in ***State v. Stuart***, 2003 WI 73, 262 Wis. 2d 620, 664 N.W.2d 82, and we will not address it further.

¶3 Stuart next contends that his trial counsel was ineffective. As a preliminary matter, we note that Stuart's trial counsel, Robert Bramscher, died before Stuart's postconviction motion hearing could be held, and Stuart was unable to preserve his testimony as generally required by ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Nevertheless, Stuart still bore the burden to support his ineffective assistance allegations with corroborating evidence to show that his trial counsel acted unreasonably and that he was prejudiced by counsel's deficient performance. ***State v. Lukasik***, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983).

¶4 The ineffective assistance standards are:

> To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court's inquiry is done.
>
> We review the denial of an ineffective assistance claim as a mixed question of fact and law. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's effectiveness independently as a question of law.

State v. Kimbrough, 2001 WI App 138, ¶¶26-27, 246 Wis. 2d 648, 630 N.W.2d 752 (citations omitted).

¶5 To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." ***State v. Reed,*** 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885, *review denied,* 2002 WI 121, 257 Wis. 2d 120, 653 N.W.2d 891 (Wis. Sept. 26, 2002) (No. 01-2973-CR). The defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). The circuit court concluded that trial counsel's representation did not prejudice Stuart or require a new trial.

¶6 Stuart first argues that trial counsel was ineffective because he did not offer evidence of charges that John Stuart intimidated a victim and solicited obstruction of justice when he sought to dissuade his wife, Elaine Stuart, from pursuing her allegations that John sexually assaulted her. Stuart contends that this evidence would have been admissible under ***State v. Amos***, 153 Wis. 2d 257, 450 N.W.2d 503 (Ct. App. 1989), to undermine John's credibility.[1]

¶7 ***Amos*** does not apply here. In ***Amos***, the circuit court admitted evidence that the defendant attempted to suborn perjury by arranging for an alibi witness in the case against him. ***Id.*** at 271. The circuit court determined that the evidence was relevant to the defendant's credibility. ***Id.*** This court affirmed on the grounds that Amos's attempt to suborn perjury "tended to show in some

[1] John Stuart's credibility was challenged in other ways. The jury knew of John's four prior convictions and that John and Paul had committed a burglary one to two weeks before the murder.

degree a consciousness of guilt" of the charge lodged against the defendant. ***Id.*** at 272. Here, however, John's actions in the matter involving Elaine Stuart were unrelated to John's incriminating testimony in the prosecution of Paul Stuart. Therefore, the evidence of John's allegedly criminal conduct would not have been admissible under ***Amos***, and Stuart's trial counsel was not ineffective for failing to offer this evidence. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (counsel cannot be faulted for not bringing a motion that would have failed).

¶8 Stuart next makes two arguments in support of his claim that the jury should have been informed that John was facing criminal charges when he incriminated Stuart in statements to detectives and in testimony at Stuart's preliminary hearing in the summer of 1998. Stuart argues that evidence of the pending charges would have shown John's bias and that he had an incentive to lie about Stuart to gain a more favorable disposition of the pending charges. Stuart challenges trial counsel's failure to use this evidence and the circuit court's evidentiary ruling declining to take judicial notice of this evidence.

¶9 With regard to trial counsel, the record reveals that counsel moved the circuit court to take judicial notice of the pending charges against John of kidnapping and first-degree sexual assault and four counts of victim intimidation. Therefore, counsel did not perform deficiently.

¶10 We turn to Stuart's claim that this evidence should have been admitted. We will uphold the circuit court's discretionary decision to exclude evidence or refuse to take judicial notice if the court had a reasonable basis for the decision. ***Wester v. Bruggink***, 190 Wis. 2d 308, 317, 527 N.W.2d 373 (Ct. App. 1994) (evidentiary decisions are discretionary); *cf.* ***Johnson v. Misericordia Cmty.***

Hosp., 97 Wis. 2d 521, 553, 294 N.W.2d 501 (Ct. App. 1980), *aff'd*, 99 Wis. 2d 708, 301 N.W.2d 156 (1981) (judicial notice is discretionary).

¶11 The circuit court did not misuse its discretion in declining to take judicial notice of the charges against John. The prosecutor stated that John did not receive any consideration on his pending charges in exchange for implicating Stuart in the murder of Reagles, and John reaffirmed his incriminating statements at Stuart's postconviction motion hearing.

¶12 Furthermore, John first incriminated Stuart in the Reagles murder in 1992 when he told police that he believed Stuart had murdered Reagles. Although John again implicated his brother six years later, his 1992 accusation was made before John faced the criminal charges which Stuart claims should have been evidence of John's bias. Additionally, court records reveal that the charges against John were resolved before he testified at the preliminary examination, thereby undermining Stuart's argument that John had an incentive to falsely accuse Stuart. We agree with the circuit court that the record does not demonstrate, beyond mere speculation, that John falsely accused Stuart of the Reagles murder or that there was a link between John's statements and the disposition of the charges against him.

¶13 Even if the evidentiary ruling were error, it was harmless. An "error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted). Four other witnesses testified that Stuart told them he shot Reagles. Therefore, impeaching John with evidence of pending criminal charges and implications of a side arrangement with the State to testify against Stuart would not have affected the other evidence against Stuart.

¶14 Stuart argues that his trial counsel was ineffective for failing to impeach Art Parramoure, a witness for the State, with his two prior criminal convictions. Stuart's trial counsel did not ask Parramoure about these convictions during cross-examination. Stuart argues that this was deficient performance by counsel. The circuit court held that Stuart was not prejudiced by counsel's failure to impeach Parramoure with his prior convictions because, in the court's experience, one or two prior convictions does not impact the jury's decision based upon all the other evidence. Even if the jury had known of Parramoure's prior convictions, the jury would not have had any difficulty assessing Parramoure's testimony.

¶15 Even if counsel was deficient in failing to impeach Parramoure, we conclude that Stuart was not prejudiced because the error was harmless, i.e., it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***Id.*** (citation omitted). Stuart's own trial testimony corroborated much of Parramoure's testimony. Parramoure testified that a few days after the murder, Stuart admitted to him that he shot Reagles. The next day, Stuart told Parramoure that this claim "was just bullshitting." During his testimony, Stuart admitted that he told Parramoure that he shot Reagles, and that he later told Parramoure he was "just bullshitting." However, Stuart explained that he claimed Reagles's murder in an attempt to make Parramoure afraid of him and to enhance Parramoure's treatment of his ex-wife, who happened to be Stuart's niece.

¶16 The failure to impeach Parramoure was not prejudicial in light of the other evidence of Stuart's guilt. In addition to the preliminary examination testimony of John Stuart (which was offered at trial), four other witnesses testified that Stuart admitted shooting Reagles. Michael Schultz testified that in March

1990, he met Stuart in a bar and Stuart told him that he had to kill Reagles. David Small testified that when he shared a jail cell with Stuart in September 1998, Stuart told him details of the Reagles shooting. Benjamin Woody testified that he was in the jail with Stuart in October 1998 when Stuart began talking about the case and suggested the State could not prove that he shot Reagles. Damian Simpson was present during Stuart's statements to Woody and stated that Stuart admitted killing Reagles. Counsel's failure to impeach Parramoure was not prejudicial because it is not reasonably probable that impeachment would have resulted in an acquittal.

¶17 Stuart next argues that his trial counsel was ineffective because he did not object when the prosecutor cross-examined him about the nature of his prior drug conviction. Counsel did not perform deficiently because Stuart opened the door to this topic during his direct examination. Stuart moved to Arizona near the time of the murder. On direct examination about his ownership of two body shops in Arizona, Stuart explained that he had to depart the first body shop after he was convicted of a drug offense. Stuart stated that his wife was caught with cocaine, and he took the blame on her behalf. Because Stuart informed the jury during his direct examination of the nature of his drug conviction, Stuart's counsel was not ineffective for failing to object to the prosecutor's inquiries on cross-examination regarding the drug conviction. *See* ***State v. Nielsen***, 2001 WI App 192, ¶¶35-36, 247 Wis. 2d 466, 634 N.W.2d 325 (defense counsel not ineffective for failing to object to questions when defense opened the door to the inquiry).

¶18 Stuart also complains about the prosecutor's inquiries regarding the burglary Stuart and John committed one to two weeks before Reagles was killed. The gun used to kill Reagles was stolen in that burglary. Stuart admitted giving the gun to Reagles the night before the shooting. The State viewed the burglary as

a motive for Reagles's killing because Reagles knew about the burglary and was threatening to disclose it if Stuart did not let him keep the gun. The defense viewed the burglary as part of the explanation for Stuart's sudden move to Arizona after the shooting. Either way, the burglary was part of the story of the murder, making it an appropriate topic for examination. Therefore, counsel was not ineffective when he failed to object to questions regarding the burglary.

¶19 Stuart contends that a new trial is necessary due to newly discovered evidence in the form of John's posttrial recantation of his statements incriminating Stuart. John allegedly told several fellow inmates that he knew Stuart did not kill Reagles, but he had implicated Stuart so that the State would drop charges against him. At the postconviction motion hearing, the circuit court concluded that the evidence of John's recantation did not make it reasonably probable that Stuart would have been acquitted.

¶20 A new trial is warranted if, among other things, the defendant establishes by clear and convincing evidence that "it is reasonably probable that, with the evidence, a different result would be reached at a new trial." ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999). Where the newly discovered evidence consists of recantation testimony, the recantation testimony must be supported by other newly discovered evidence. ***State v. McCallum***, 208 Wis. 2d 463, 477, 561 N.W.2d 707 (1997). This corroboration requirement is satisfied if there is a feasible motive for the initial false statement and there are circumstantial guarantees of the trustworthiness of the recantation. ***Id.*** at 477-78. The motion for a new trial is addressed to the circuit court's sound discretion, and we will affirm the court's decision if it has a reasonable basis and was made in accordance with accepted legal standards and facts of record. ***Carnemolla***, 229 Wis. 2d at 656.

¶21 Stuart must demonstrate that there is a feasible motive for John's original false statement and circumstantial guarantees of the trustworthiness of his recantation. *See* ***McCallum***, 208 Wis. 2d at 477-78. This burden cannot be met. The circuit court did not find that John incriminated Stuart to reduce his charges (a feasible motive to lie) and, more importantly, John denied the recantation statements when he testified at the postconviction motion hearing. At that hearing, John reaffirmed the truthfulness of his preliminary examination testimony which was introduced at trial. The circuit court concluded that there was not a reasonable probability that the outcome would be different if the jury were to hear the allegedly newly discovered evidence of John's recantation, particularly in light of the large amount of evidence from other sources linking Stuart to the crime. We agree. The circuit court properly exercised its discretion in denying Stuart's motion for a new trial.

¶22 Finally, citing all of his previous arguments, Stuart asks that we reverse his conviction in the interest of justice. Having rejected these arguments, we also reject the request for a reversal in the interest of justice.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

County of Kenosha

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James D. Newton
Shelly I. Resch

May 12, 1998

COPY

Attorney Jon G. Mason
1020 - 56th Street
Kenosha, Wisconsin 53140

Re: John W. Stuart

Dear Mr. Mason:

Please be advised that the Kenosha County District Attorney's Office and the Kenosha Police Department are interested in resolving the death investigation concerning Gary Reagles. It is my understanding that the Kenosha Police Department would like to further discuss Mr. Reagles' death with your client, Mr. John Stuart. This letter serves to inform you that the Kenosha County District Attorney will not pursue charges against John W. Stuart for truthful information that he provides to law enforcement regarding Mr. Reagles' death. The only caveat to this agreement would be if Mr. Stuart turns out to be the shooter. We are operating under the assumption that John Stuart is not the shooter, but we do believe he knows much more about the crime than he has told law enforcement to date.

If you have any questions regarding the above, please contact me at your earliest convenience so that we may facilitate a further interview of Mr. Stuart. Thank you for your time and consideration in this matter.

Sincerely,

Susan Karaskiewicz

Susan Karaskiewicz
Deputy District Attorney
State Bar #1018376

SLK:pdh

KENOSHA POLICE DEPARTMENT
SUPPLEMENTARY INVESTIGATIONS REPORT

No. of Pages	Date of Supplementary	Date and Time Reported	Case or Event No.
1 of 1	06/01/98	03/27/90 1504	90-029892

REPORTING OFFICER DETECTIVE GUY TAPPA
K.P.D.

NATURE OF CASE: Homicide Investigation

WITNESS:
NAME: John W. Stuart **DOB: 04-10-62** **S/R M/W**
ADDRESS: Dodge Correctional **CITY/STATE:**
PHONE: **WORK PHONE:**

On 06-01-98 Det. Strash and I reinterviewed John Stuart at the PSB. Stuart's attorney John Mason was present. After talking with other people involved in this investigation we felt Stuart had not told us every thing he knew about Gary Reagles death. I made arrangements fo John Stuart to be given immunity in the burglary to Ron Conde's house in Ill. by the Ill. States Attorney's Office and immunity in any involvement in Gary Reagles death as long as he was not directly involved in causing his death. The Kenosha County DAs office granted this for his testimony.

John Stuart gave us a written statement then, admitting to committing the burglary to Ro Conde's house with his brother Paul Stuart. John Stuart also told us he saw Paul Stuart and Gary Reagles together the evening before Reagles was found dead. John told us Paul said he killed Gary Reagles because he threatened to tell on Paul for burglarizing Ron Conde's home. This makes sense being that Gary Reagles' mother was the girlfriend of George Stuart (Paul's brother) who was being blamed for the burglary by Ron Conde. John told us that Paul said after he killed Gary Reagles he made it look like a suicide, including locking the doors behind him when he left. could door be locked without key?

John also told us that he told his wife Elaine about the burglary and about what Paul told him. I will arrange to interview Elaine Stuart soon.

INVESTIGATION CONTINUING CASE OPEN:

Reporting Officer	2nd Officer	Supervisor
G D Tappa		Lt. Thomas 6-1-98

RECORDS BUREAU

STATE OF WISCONSIN

IN SUPREME COURT

No. 01-1345-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PAUL J. STUART,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL S. FISHER, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

IN SUPREME COURT

No. 01-1345-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PAUL J. STUART,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL S. FISHER, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, oral argument and publication of the court's decision are warranted.

STATEMENT OF THE CASE

Because most of relevant facts and procedural history of this case were summarized in this court's previous decision, *State v. Paul J. Stuart*, 2003 WI 73, ¶¶5-19, 262 Wis. 2d 620, 664 N.W.2d 82 (*Stuart I*) (R-Ap. 101-31), a copy of which is included in the appendix to this brief, the state exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). Additional facts relevant to the state's harmless error argument will be discussed in the argument section of this brief.

ARGUMENT

Paul Stuart was convicted in 1999 of first-degree intentional homicide for the 1990 shooting death of Gary Reagles. In this appeal from the judgment of conviction and order denying postconviction relief, Stuart argues that the admission at trial of the preliminary hearing testimony of his brother John violated his constitutional right to confrontation, as guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution.

This is the third time that this case and its confrontation issue has come before this court. The first time, in 1999, in an interlocutory appeal by the state, the court reversed a decision of the court of appeals affirming a trial court order that excluded the preliminary hearing testimony on confrontation clause grounds (63:1-2). The second time, in 2003, in Stuart's direct appeal from his conviction, the court held that its 1999 decision established the law of the case with regard to the confrontation clause issue. *See Stuart I*, 262 Wis. 2d 620, ¶43 (R-Ap. 126-27). The court found that there were no extraordinary circumstances present that would justify a departure from the law of the case doctrine because the testimony was properly admitted under *State v. Bauer*, 109 Wis. 2d 204, 325 N.W.2d 857 (1982), and other confrontation clause cases such as *Ohio v. Roberts*, 448

U.S. 56 (1980). *See Stuart I*, 262 Wis. 2d 620, ¶¶32-41 (R-Ap. 119-26).

The court did not decide the other issues raised by Stuart and remanded those issues for consideration by the court of appeals. *See id.* at ¶4 (R-Ap. 103). The court of appeals rejected all of Stuart's other claims and affirmed the judgment of conviction and order denying postconviction relief. *State v. Paul J. Stuart*, Case No. 01-1345 (Ct. App. Dec. 10, 2003) (*Stuart II*) (A-Ap. 103-11). Stuart then filed a petition for review in which, among other things, he asked the court to reconsider its 2003 decision.

While that petition was pending, the United States Supreme Court issued its decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), which fundamentally changed the analysis of confrontation clause claims, at least with respect to the admission of "testimonial" hearsay. This court recognized the significance of *Crawford* when it asked the parties to file supplemental pleadings addressing the effect of *Crawford*. When the court granted the petition, it limited its review to "the impact, if any, *Crawford v. Washington* has on this case," including whether *Crawford* "should be applied retroactively to this case" (A-Ap. 102).

The impact of *Crawford* on this case is substantial, but it does not change the ultimate result. The state agrees with Stuart that *Crawford* should be retroactively applied to this case because it is still on direct appeal. The state also agrees with Stuart that because *Crawford* represents a change in controlling authority, the law of the case doctrine does not preclude this court from revisiting Stuart's confrontation clause claim. *See Stuart I*, 262 Wis. 2d 620, ¶24 (R-Ap. 112-13). And finally, the state agrees with Stuart that under the new standard announced in *Crawford*, the admission of John's preliminary hearing testimony violated Stuart's constitutional right to confrontation.

Stuart is not entitled to a new trial, however, because the error in admitting John's preliminary hearing testimony was harmless. The confrontation problem arose because Stuart was precluded from cross-examining John at the preliminary hearing about the circumstances of John's June 1998 statement to police incriminating Stuart. As a result, Stuart was unable to elicit from John evidence that John had been facing criminal charges in 1998 when he gave a statement to police implicating Stuart in the death of Mr. Reagles. However, John testified at the preliminary hearing that he gave the same information to the police in 1992. As Stuart acknowledges, that "1992 accusation was made before John faced his criminal charges which Stuart claims should have been evidence of John's bias." Stuart's brief-in-chief at 30.

Moreover, John was only one of six witnesses to testify that Stuart admitted shooting Gary Reagles. As the court of appeals correctly observed, "impeaching John with evidence of pending criminal charges and implications of a side arrangement with the State to testify against Stuart would not have affected the other evidence against Stuart." *Stuart II*, slip op. at ¶13 (A-Ap. 107). Accordingly, although Stuart's confrontation right was violated under the new standard announced in *Crawford*, the error was harmless.

I. THE SUPREME COURT'S DECISION IN *CRAWFORD* SHOULD BE APPLIED RETROACTIVELY TO THIS CASE.

In its order granting the petition for review, the court directed the parties to "address the question of whether *Crawford v. Washington* should be applied retroactively to this case" (A-Ap. 102). Because this case is on direct appeal, the new rule of *Crawford* should be applied to Stuart's claim that the admission of John's preliminary hearing testimony violated his right of confrontation.

Whether a new rule of criminal law should be applied retroactively "is dependent upon two threshold determinations: 1) whether the rule is a new rule of substance or new rule of criminal procedure and 2) whether the case which seeks to benefit from retroactive application is on direct review or is final, such that it is before the court on collateral review." *State v. Lagundoye*, 2004 WI 4, ¶11, 268 Wis. 2d 77, 674 N.W.2d 526. A new rule of substantive criminal law "is presumptively applied retroactively to all cases, whether on direct appeal or on collateral review," while "new rules of criminal procedure are to be applied retroactively to all cases pending on direct review or non-finalized cases still in the direct appeal pipeline." *Id.*, ¶12.

Thus, when a criminal case is on direct appeal, a new rule of law will be applied retroactively whether it is a new rule of substance or a new rule of procedure. Even though Stuart was convicted in 1999, this case is still on direct appeal.[1] It does not matter, therefore, whether

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[1] The judgment of conviction in this case was entered on April 16, 1999 (82:1). Following four motions to extend the time for preparing transcripts (86; 87; 88; 88A) and seven motions to extend the time for filing a notice of appeal or postconviction motion (89; 90; 91; 92; 93; 94; 95), Stuart filed a motion for postconviction relief pursuant to Rule 809.30 on November 3, 2000 (96), a year and a half after entry of the judgment of conviction. The time for the circuit court to decide that motion was extended twice (97; 103), and the circuit court issued its order denying that motion on April 11, 2001 (106), two years after entry of the judgment.

Stuart sought and received five extensions totaling more than seven months of the time to file his appellate brief. (The state did not seek any extensions.) Briefing was completed on June 24, 2002, three years following conviction. The court of appeals certified the appeal on November 20, 2002, and this court granted certification on December 11, 2002. On July 1, 2003, four years after Stuart's conviction, the court issued its decision rejecting Stuart's confrontation clause claim and remanding his other claims to the court of appeals. The court of appeals issued its decision on December 10, 2003. This court granted Stuart's petition for review on June 8, 2004, five years after entry of the judgment of conviction.

Crawford's new rule is categorized at substantive or procedural – in either event, it will be applied to this case.

Whether *Crawford*'s rule is procedural or substantive is likely to make a difference in some future case that comes before this court. The state notes, therefore, that the *Crawford* decision states that the confrontation clause provides "a procedural rather than a substantive guarantee." 124 S. Ct. at 1370. Consistent with that characterization, courts in other jurisdictions have held that *Crawford* applies retroactively to cases on direct appeal but not to collateral challenges to convictions that have become final. *See People v. Price*, 15 Cal. Rptr. 3d 229, 238 (Cal. Ct. App. 2004) (*Crawford* applies to cases pending on direct appeal); *People v. Cage*, 2004 WL 1576410, *9 (Cal. Ct. App. July 15, 2004) (while *Crawford* "probably would not apply retroactively in a habeas corpus proceeding," it applies to criminal cases still pending on direct review); *People v. Edwards*, 2004 WL 1575250, *3-4 (Colo. Ct. App. July 15, 2004) (*Crawford* applies retroactively to cases on direct appeal at the time it was announced but not to postconviction proceedings involving convictions that became final before it was announced); *Davis v. United States*, 848 A.2d 596, 599 (D.C. 2004) (*Crawford* applied on direct appeal); *State v. Cox*, 2004 WL 1337470, *5 (La. Ct. App. June 16, 2004) (same); *People v. Khan*, 2004 WL 1463027, *2-4 (N.Y. Sup. Ct. June 23 2004) (*Crawford* does not apply retroactively to collateral challenge).

II. THE ADMISSION OF JOHN'S PRELIMINARY HEARING TESTIMONY VIOLATED STUART'S RIGHT TO CONFRONTATION AS INTERPRETED IN *CRAWFORD*.

A. The change in confrontation clause analysis wrought by *Crawford*.

Prior to the Supreme Court's decision in *Crawford*, the test for determining whether the admission of hearsay evidence violated the confrontation clause was that established in *Ohio v. Roberts*. In *Roberts*, the Court set forth a two-part test to determine whether a prior statement of a hearsay declarant was admissible. *Roberts*, 448 U.S. at 65-66. First, the Court held that the confrontation clause required that the declarant be unavailable to testify at trial. *Id.* at 65. Second, the Court held that the confrontation clause permits the admission of a hearsay statement "only if it bears adequate 'indicia of reliability.'" *Id.* at 66. Reliability could be inferred where the testimony fell under a firmly rooted hearsay exception. *Id.* at 66. If it did not, the evidence could be admitted only when it possessed "particularized guarantees of trustworthiness." *Id.*

Applying this test in *Roberts*, the Court found that the confrontation clause was not violated by the introduction of an unavailable witness's preliminary hearing testimony where the witness had been cross-examined at the preliminary hearing. *Id.* at 73. The Court held that "'[s]ince there was an adequate opportunity to cross-examine [the witness], and counsel ... availed himself of that opportunity, the transcript ... bore sufficient "indicia of reliability" and afforded "the trier of fact a satisfactory basis for evaluating the truth of the prior statement."'" *Id.*, quoting *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972).

This court adopted the *Roberts* analysis in *Bauer*, when it held that the admission of an unavailable witness's preliminary examination testimony did not violate the defendant's right to confrontation. *See Bauer*, 109 Wis. 2d at 208-22. This court applied the *Roberts/Bauer* framework in its previous decision in this case when it held that the admission of John's preliminary hearing testimony did not violate Stuart's confrontation right. *See Stuart I*, 262 Wis. 2d 620, ¶¶32-41 (R-Ap. 119-26).

The Supreme Court's decision in *Crawford* rejected the reliability prong of the *Roberts* test in favor of an inquiry into whether the defendant had a prior opportunity to cross-examine witnesses. *Crawford*, 124 S. Ct. at 1374. To explain its abrogation of the *Roberts* test, the Court began with a discussion of the purposes of the confrontation clause. *Id.* at 1363-67. The Court explained that the "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 1363. The Court noted that the common law at the time of the Sixth Amendment's enactment "conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations." *Id.* at 1366.

The Court stated that while the confrontation clause's "ultimate goal is to ensure reliability of evidence," the clause provides "a procedural rather than a substantive guarantee." *Id.* at 1370. "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* Where testimonial statements are involved, the Court said, "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.* The flaw in the *Roberts* test is that it "allows a jury to hear evidence, untested by the

adversary process, based on a mere judicial determination of reliability." *Id.* The Court cited inconsistent decisions regarding reliability as a reason why allowing courts to make reliability determinations does not provide the protection envisioned by the Framers adopting the confrontation clause. *Id.* at 1371 (noting that the "Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), ... while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect") (citation omitted).

The Court concluded that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id.* at 1370. Thus, the Court held, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 1374.

The Court limited its holding to "testimonial statements," noting that the confrontation clause applies to "witnesses" or those who "bear testimony." *Id.* at 1364. The Court expressly declined to develop a comprehensive definition of "testimonial," but did state that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 1374.

The *Crawford* decision leaves open many questions that will have to be addressed by the lower courts. *See Fowler v. State*, 809 N.E.2d 960, 966 (Ind. App. 2004) (Crone, J., concurring) ("The fallout from Justice Scalia's 'clarification' of the Confrontation Clause in *Crawford* will reverberate through the evidentiary landscape for some time to come and will create countless dilemmas for trial and appellate courts."). Among those unanswered questions are:

✦ What types of statements, in addition to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" and "police interrogations," *Crawford*, 124 S. Ct. at 1374, constitute "testimonial" statements for purposes of confrontation clause analysis? *Crawford* quoted three possible standards without choosing among them. *Id.* at 1364. In his concurring opinion, Chief Justice Rehnquist criticized the *Crawford* majority for not resolving that issue. *See id.* at 1378 (Rehnquist, C.J., concurring) ("[T]he thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of 'testimony' the Court lists ... is covered by the new rule. They need them now, not months or years from now."). [2]

✦ Are "nontestimonial" hearsay statements exempt from confrontation clause scrutiny? It may be that nontestimonial hearsay statements need only satisfy state evidentiary rules. In *Crawford*, the Court noted that, in *White v. Illinois*, 502 U.S. 346 (1992), it had rejected the argument that the confrontation clause should be applied "only to testimonial statements, leaving the remainder to regulation by hearsay law[.]" *Crawford*, 124 S. Ct. at 1370. The *Crawford* decision then states that "[a]lthough our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today[.]" *Id.*; *see United States v. Reyes*, 362 F.3d 536, 540 n.4 (8th Cir. 2004) (noting that "*Crawford* did not provide additional protection for nontestimonial statements, and indeed, questioned whether the Confrontation Clause protects nontestimonial statements at all").

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[2] The Court did indicate that some statements covered by the hearsay exceptions are not testimonial in nature, such as business records or statements in furtherance of a conspiracy. *Crawford*, 124 S. Ct. at 1367. The Court also left open the question of whether the Sixth Amendment incorporates an exception for testimonial dying declarations. *Id.* at 1367 n.6.

✦ If nontestimonial hearsay is subject to the confrontation clause, does the *Roberts* framework govern its admission? *Crawford* suggests that if nontestimonial hearsay is not exempt from confrontation clause concerns, the *Roberts* standard might apply: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law -- as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.* at 1374; *see State v. Vaught*, 682 N.W.2d 284, 292 (Neb. 2004) (observing that *Crawford* "made no explicit statement regarding nontestimonial statements but did suggest that either such statements required no Confrontation Clause scrutiny or that prior standards developed under *Ohio v. Roberts* ... or its progeny still applied to nontestimonial hearsay evidence").

✦ Is preliminary hearing testimony admissible under *Crawford* if the defendant's cross-examination was not restricted by the circuit court? Or does the very nature of the preliminary hearing mean that, as a matter of law, a defendant does not have an opportunity to cross-examine a witness that is sufficient to satisfy the requirements of the confrontation clause?

A defendant has a statutory right to cross-examine witnesses against him at a preliminary hearing. *See* Wis. Stat. § 970.03(5); *State ex rel. Huser v. Rasmussen*, 84 Wis. 2d 600, 614, 267 N.W.2d 285 (1978). But the permissible scope of that cross-examination is limited. *Huser*, 84 Wis. 2d at 614. The preliminary hearing "is intended to be a summary proceeding to determine essential or basic facts" relating to probable cause, not a "full evidentiary trial on the issue of guilt beyond a reasonable doubt." *State v. Dunn*, 121 Wis. 2d 389, 396-97, 359 N.W.2d 151 (1984). Accordingly, "[c]ross-examination at a preliminary examination may not be used for the purpose of exploring the general trustworthiness of the witness." *Huser*, 84 Wis. 2d at 614; *see also State v. Sturgeon*, 231 Wis. 2d 487, 499, 605 N.W.2d 589 (Ct.

App. 1999) (stating that attacks on witnesses' credibility are "off limits in a preliminary hearing setting").

When those limits are enforced, as they were in this case, a confrontation clause problem arises. But in some cases, prosecutors may not object to cross-examination that goes to the witness's credibility and the preliminary hearing judge may not limit questions absent an objection from the prosecutor. *See State v. Tomlinson*, 2001 WI App 212, ¶31, 247 Wis. 2d 682, 635 N.W.2d 201, *aff'd*, 2002 WI 91, 254 Wis. 2d 502, 648 N.W.2d 367 (noting that defense counsel challenged "clearly challenged the reliability and credibility of [the witness] during the cross-examination at the preliminary hearing"). In such a case, there would not appear to be a confrontation clause problem.

However, in some cases in which there were no objections lodged to the defendant's cross-examination, defense counsel simply may have refrained from entering into prohibited territory in anticipation that an objection would be forthcoming and that it would be sustained. In other cases, the limitations on cross-examination may not have been enforced because defense counsel simply did not engage in cross-examination. Would a defendant have had an adequate opportunity for cross-examination under those circumstances? *See People v. Fry*, 92 P.3d 970, 978 (Colo. 2004) (holding as a matter of law that "the preliminary hearing does not provide an adequate opportunity to cross-examine sufficient to satisfy the Confrontation Clause requirements").[3]

These difficult questions are not presented by this case. This court need not attempt a comprehensive definition of "testimonial" hearsay or address the standard to be applied to "nontestimonial" hearsay because there is no question that John's testimony at the preliminary hearing constituted testimonial hearsay evidence.

[3] The state notes that Colorado applied that same rule prior to *Crawford*. *See Fry*, 92 P.3d at 976-77.

Crawford, 124 S. Ct. at 1374. Nor does this court need to decide whether preliminary hearing testimony is admissible under *Crawford* when defense counsel declines to cross-examine a witness at the preliminary hearing or is able to cross-examine the witness without objection, because Stuart's counsel was limited in the questions he was able to pose to John. Rather, the narrower issue presented by this case is whether Stuart's inability to question John about a potential motive to testify violated Stuart's right to confrontation.

B. Application of *Crawford* to this case.

In its previous decision in this case, this court acknowledged that Stuart had been unable to cross-examine John about the circumstances of his June 1998 statement to police. *See Stuart I*, 262 Wis. 2d 620, ¶41 (R-Ap. 124-26). The court nevertheless concluded that the admission of John's preliminary hearing testimony did not violate Stuart's right to confrontation because "John's testimony at the preliminary hearing and the circumstances surrounding it were sufficient to satisfy the requirement that there be indicia of reliability." *Id.* at ¶41 (R-Ap. 125).

In light of *Crawford*, the *Roberts/Bauer* reliability analysis that this court applied in *Stuart I* is no longer good law with respect to the admission of testimonial hearsay statements. Under *Crawford*, "preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine." *Crawford*, 124 S.Ct. at 1367. Because Stuart was precluded from cross-examining John with regard to whether he was biased as a result of pending criminal charges, the state does not believe that Stuart had an adequate opportunity to cross-examine John.

In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the Court held that the defendant's confrontation right was

violated when he was prohibited from cross-examining a prosecution witness about the possibility that the witness was biased as a result of dismissal of a pending charge. The Court stated that "'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Id.* at 678-79, quoting *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). The Court held that by "cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause." *Id.* at 679.

This court similarly held in *State v. Lenarchick*, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), that a defendant, "as an ingredient of meaningful cross-examination, must have the right to explore the subjective motives for the witness' testimony." *Id.* at 448. In *Lenarchick*, the defense was not permitted to cross-examine a witness about a charge against that witness that had been dismissed while the defendant's case was pending. *Id.* at 446. The court noted that even though there had been no promises made to the witness, "he may well have been testifying favorably to the state in the hope and expectation that the state would reward him by dropping or reducing pending charges." *Id.* at 447. "Even though that expectation were absurd," the court concluded, "defense counsel had the right and duty to explore the witness' motives." *Id.*

In this case, the jury heard information that bore on the reliability of John's perceptions and recall. *See Stuart I*, 262 Wis. 2d 620, ¶41 (R-Ap. 124-26). However, it did not get to hear evidence that, Stuart asserts, would have shown that John was biased because he was trying to curry favor with the state. Had John testified at trial and the defense been precluded from exploring the same topic, it seems all but certain that an appellate court would view that as a violation of his confrontation right. *See Lenarchick*, 74 Wis. 2d at 446-48; *see also State v.*

Barreau, 2002 WI App 198, ¶55, 257 Wis. 2d 203, 651 N.W.2d 12 ("because the right of confrontation includes the right to reveal potential bias, defendants must be permitted to cross-examine witnesses regarding motives for testifying for the State.").

Support for the conclusion that the confrontation clause requires that the defendant have had an opportunity to cross-examine the witness that is substantially equivalent to the opportunity that he would have at trial comes from pre-*Roberts* decisions of the Supreme Court in which the Court found that the admission of prior testimony did not violate the confrontation clause. In none of those cases does there appear to have been any significant restriction on the defendant's cross-examination of the witness in the prior proceeding.

✦ In *Mattox v. United States*, 156 U.S. 237 (1895), the Court held that the admission of the prior trial testimony of two deceased witnesses did not violate the defendant's confrontation right. The Court noted that the witnesses had been "fully examined and cross-examined" at the first trial. *See id.* at 240; *see also Crawford*, 124 S. Ct. at 1367 (discussing *Mattox*).

✦ In *California v. Green*, 399 U.S. 149 (1970), the Court held that an absent witness's preliminary examination testimony was admissible because it had been subjected to "extensive cross-examination" by defense counsel, *id.* at 151, "under circumstances closely approximating those that surround the typical trial," *id.* at 165. The Court emphasized that the defendant "had every opportunity to cross-examine" the witness at the preliminary hearing. *Id.*

✦ In *Mancusi v. Stubbs*, the Court held that the prior trial testimony of an unavailable witness was admissible. The Court noted that there had been an "adequate opportunity to cross-examine [the witness] at the first trial, and counsel for [defendant] availed himself of that opportunity." *Mancusi*, 408 U.S. at 216. There is nothing

in the decision to suggest that there were any limitations on cross-examination at the first trial. *Id.* at 207-16.

The *Crawford* Court noted that even in *Roberts*, the outcome "hew[ed] closely to the traditional line." *Crawford*, 124 S. Ct. at 1368. The unavailable prosecution witness in *Roberts* had been called by the defense to testify at the preliminary examination. *Roberts*, 448 U.S. at 58. The *Roberts* Court noted that while Ohio law might have permitted the prosecutor to object to some of the defendant's questions at the preliminary hearing, that had not happened. *See id.* at 56. As a result, defense counsel was not "significantly limited in any way in the scope or nature" of his examination of the witness. *Id.*

A case in which the Court held that the admission of an absent witness's preliminary testimony did violate the confrontation clause, *Pointer v. Texas*, 380 U.S. 400 (1965), also is instructive. The Court held in *Pointer* that the defendant had not had an adequate opportunity to question the witness at the preliminary because he was not afforded counsel at that hearing. *Id.* at 407. The Court stated that "[t]he case before us would be quite a different one had [the witness's] statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." *Id.* at 407.

The state believes that *Crawford*'s insistence on cross-examination as the only procedure that satisfies the right to confrontation means that an unavailable witness's prior testimony is admissible only if the defendant had an opportunity for cross-examination at the prior proceeding that was substantially equivalent to that which he would have at trial. At a minimum, a defendant has a right to cross-examine the witness concerning matters that bear on the witness's credibility, including the witness's ability to accurately perceive events and then to correctly recall and relate those perceptions at trial, *see Hampton v. State*, 92 Wis. 2d 450, 455, 285 N.W.2d 868 (1979), and the

witness's motive for testifying, *see Barreau*, 257 Wis. 2d 203, ¶55.

In this case, the jury was informed by the court that John had four criminal convictions (65:10-11), and learned from his direct examination at the preliminary hearing that he had committed a burglary a week or two before the death of Gary Reagles (65:15). During cross-examination, Stuart's counsel elicited admissions from John that he was "stoned" and "confused" when he spoke with Stuart about the killing (65:21), that he was uncertain whether Stuart had said he had fired two shots (65:23), and that he initially lied to police when he said that Stuart had been at his home on the night in question (65:24). However, Stuart was not permitted to question John about John's motive for testifying (65:18). As a result, Stuart's right to confrontation, as newly defined by *Crawford*, was violated.

In its supplemental response to the petition for review in this case, the state noted that this court, in its previous decision in this case, had held that "[d]efense counsel was able to meaningfully cross-examine" John at the preliminary hearing. *Stuart I*, 262 Wis. 2d 620, ¶41 (R-Ap. 125). In its discussion of whether John's preliminary hearing testimony was admissible under Wis. Stat. § 948.045, the court had observed:

> Although the scope of the cross-examination was somewhat limited by the scope of preliminary hearings, Paul was able to challenge the witness's veracity on cross-examination. Indeed, only one objection was sustained during the cross-examination. Additionally, testimony relating to credibility came up during the direct examination of John as well. On direct examination, John admitted participating in a burglary. On cross-examination, John admitted drug use, confusion while talking to Paul about Paul's possible involvement in the shooting, and the fact that he lied to police

Id. at ¶35 (R-Ap. 121).

After concluding that John's preliminary hearing testimony was admissible under § 908.045, the court turned to the confrontation clause issue. It held that Stuart's counsel "was able to meaningfully cross-examine John" at the preliminary hearing. *Id.* at ¶41 (R-Ap. 125). The court explained:

> [Defense counsel] directly challenged the substance of John's statements. For example, he got John to admit that he was under the influence of drugs at the time Paul allegedly confessed to him. He admitted that he was a drug user and that on the morning Paul confessed to shooting Reagles, he was confused and smoked additional marijuana after talking to Paul. Defense counsel was able to point out inconsistencies in John's version of the facts. John stated that Paul told him the gun was fired twice. Reagles was shot only once. Defense counsel also got John to admit that he lied to police. These questions are sufficient to give the jury a basis from which to determine John's reliability.

Id. at ¶41 (R-Ap. 125-26).

The state argued in its supplemental response to the petition for review that because the court had held that Stuart's counsel "was able to meaningfully cross-examine John," *id.* at ¶41 (R-Ap. 125), Stuart's confrontation rights, as defined in *Crawford*, were honored. After further consideration, however, the state no longer takes that position. Basing a confrontation clause analysis on a judicial determination that the defendant's prior cross-examination was "meaningful," even though he was not permitted to cross-examine the witness about potential sources of bias, replicates the flaw in the *Roberts* test that *Crawford* condemned of basing the constitutional analysis on a judicial determination of "reliability."

Under the *Crawford* standard, a defendant must have had an adequate opportunity to cross-examine the witness at the prior proceeding. Because the trial court (properly) did not allow Stuart to cross-examine John at the preliminary hearing about the effect on the pending

charges against John on his decision to cooperate with the state, Stuart's right to confrontation right was not honored when the preliminary hearing testimony was used at trial.

III. THE ERROR WAS HARMLESS.

Violations of a defendant's right to confrontation are subject to a harmless error analysis. *See Van Arsdall*, 475 U.S. at 684; *State v. Williams*, 2002 WI 118, ¶2, 256 Wis. 2d 56, 652 N.W.2d 391.[4] Although the state acknowledges that the admission of John's preliminary hearing testimony violated Stuart's confrontation rights, that error was harmless. "A constitutional or other error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Harvey*, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189, quoting *Neder v. United States*, 527 U.S. 1, 18 (1999).

There are two reasons why the admission of John's preliminary hearing testimony was harmless error. First, although Stuart was not allowed to question John about the charges that were pending against him when he gave his June 1998 statement to the police, John gave the same information to the police in 1992, when no charges were pending. Eliciting information about the 1998 charges would have had little impeachment value, therefore, because those charges could not have provided a motive for John to have identified his brother as the killer six years earlier. Second, there were five witnesses other than John who testified that on three other occasions, both shortly after the killing and after Stuart was arrested years later, Stuart said that he killed Gary Reagles.

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[4] The Supreme Court did not conduct a harmless error analysis in *Crawford* because the state had not challenged the Washington court of appeals' conclusion that the confrontation violation was not harmless. *Crawford*, 124 S. Ct. at 1359 n.1.

A. Stuart would not have been able to effectively impeach John's testimony.

At the preliminary hearing, John testified that he first told City of Kenosha Detective Guy Tappa and another detective in 1992 or 1993 that Stuart had admitted shooting Mr. Reagles (11:17-18; 65:20). John testified that he gave the police then "pretty much the same information [he] testified to today" (11:18; 65:20). The jury was aware, through the reading of the preliminary hearing transcript, that John had testified that he had given the same information to the police in 1992 or 1993 that he testified to at the preliminary hearing (65:20).

Detective Tappa testified at trial that he stopped John's vehicle in 1992 because he thought John was his brother Larry, for whom there was an outstanding warrant (59:8). Detective Tappa testified that he had a conversation with John, following which he wrote a report and turned John over to another detective (59:9). Detective Tappa wrote a report that same day; he identified that report at trial (*id.*).

Detective Tappa was not asked by the prosecutor or by defense counsel about the substance of his 1992 conversation with John or the contents of his report (59:8-9, 47-146). It is reasonable to assume, however, that the report documented Detective Tappa's conversation with John. It also is reasonable to assume that if John's 1992 statement to Detective Tappa differed in any significant way from his preliminary hearing testimony, defense counsel would have asked Detective Tappa about that prior inconsistent statement.

It is reasonable to conclude, therefore, that John was testifying truthfully at the preliminary hearing when he said that he gave the same information to the police in 1992 that he testified to at the preliminary hearing. That is significant because Stuart has made no claim that John had any reason to curry favor with the state or be

untruthful in 1992, and there is nothing in the record that would even remotely support such a claim.[5] Indeed, Stuart acknowledges that John's "1992 accusation was made before John faced his criminal charges which Stuart claims should have been evidence of John's bias." Stuart's brief-in-chief at 30.

Further evidence that Stuart would not have been successful in using the 1998 charges against John to impeach John comes from the fact that those charges had been resolved prior to his testimony at the preliminary examination in this case. According to CCAP records, John was sentenced in Kenosha County Case No. 98-CF-348 on July 24, 1998, and the charges against him in Kenosha County Case No. 98-CF-17 were dismissed on June 2, 1998. The preliminary hearing in this case was held on August 13, 1998 (11:1). Because all of the charges against John Stuart had been fully resolved by the time of the preliminary hearing in this case, they could not have provided an incentive for him to lie at the preliminary hearing by falsely accusing his brother of murder.

In addition, the state notes that Stuart questioned John at the postconviction hearing about the charges that were reduced or dismissed in 1998. John emphatically stated that he had not "lied about anything to anybody so I can get a charge reduced or tooken [sic] away" (105:17). The reason the charges had been dismissed, John testified, was because the alleged victim had stated that John had not committed the alleged crimes (*id.*). John stated that the reason he refused to testify at trial was that he was trying to help his brother (105:11).

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[5] The state notes that Stuart called John as a witness at the hearing on his postconviction motion, but did not ask John any questions about the circumstances surrounding John's 1992 statement to the police (105:5-19).

The court of appeals recognized the significance of these facts when it rejected Stuart's argument that the trial court erred when it declined to take judicial notice of the criminal charges pending against John in 1998. *See Stuart II*, slip op. at ¶¶10-11 (A-Ap. 106-07). The court of appeals held that the trial court properly exercised its discretion in declining to take judicial notice of the charges against John because Stuart had not demonstrated a link between those charges and John's incriminating statements. *Id.* at ¶¶11-12 (A-Ap. 107). The court explained:

> John first incriminated Stuart in the Reagles murder in 1992 when he told police that he believed Stuart had murdered Reagles. Although John again implicated his brother six years later, his 1992 accusation was made before John faced the criminal charges which Stuart claims should have been evidence of John's bias. Additionally, court records reveal that the charges against John were resolved before he testified at the preliminary examination, thereby undermining Stuart's argument that John had an incentive to falsely accuse Stuart. We agree with the circuit court that the record does not demonstrate, beyond mere speculation, that John falsely accused Stuart of the Reagles murder or that there was a link between John's statements and the disposition of the charges against him.

Stuart II, slip op. at ¶12 (A-Ap. 107).

Stuart also contends that he was not able at the preliminary hearing to elicit John's testimony that the district attorney's office had agreed that it would not pursue charges against John for truthful information he provided regarding Mr. Reagles death unless John "turn[ed] out to be the shooter" (96:8; A-Ap. 112). But eliciting that information would not have aided the defense because the theory of the defense was not that John or anyone else killed Mr. Reagles but that Mr. Reagles committed suicide (67:148-58) – a not implausible theory given that Mr. Reagles' death initially

had been ruled a suicide[6] and there was evidence that he had attempted suicide on other occasions and had made suicidal statements shortly before he died (41:83, 85-87; 44:68, 76). There is no suggestion in the record that John had ever been a suspect in Mr. Reagles death; indeed, defense counsel did not dispute the trial court's observation that John had "not even been slightly implicated in the killing" (65:94). Moreover, as the grant of immunity had been memorialized in a letter from the district attorney's office to Stuart's counsel and in a report prepared by Detective Tappa (96:8-9; A-Ap. 112-13), that information potentially could have been elicited from sources other than John.[7]

Finally, the state notes that there was other evidence admitted at trial that impeached John's credibility. As previously discussed, the jury knew that John had four criminal convictions and that he had committed a burglary a week or two before the death of Gary Reagles (65:10-11, 15). During cross-examination, John admitted that he was "stoned" and "confused" when he spoke with Stuart about the killing (65:21), that he was

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[6] In his closing argument, defense counsel stated, without objection, that the death certificate listed Mr. Reagles' cause of death as suicide (67:148). The trial court took judicial notice of the death certificate (67:110), but that document is not in the appellate record and there was no testimony at trial that there had been any official determination that the death was a suicide. The assistant medical examiner who performed the autopsy on Mr. Reagles testified that he had made no determination that the death had been a suicide (46:5, 15-16).

[7] Detective Tappa also stated in his report that he had "made arrangements for John Stuart to be given immunity" for an Illinois burglary (96:9; A-Ap. 113).

It is unclear whether the court would have permitted Stuart to question Detective Tappa about the immunity grant, as Stuart never attempted to do so. When the court refused Stuart's request to take judicial notice of the court files of the criminal cases against John, it stated that "[t]he jury will be informed that John Stuart had four prior convictions, and that will be the end of what we know about John Stuart" (65:8).

uncertain whether Stuart had said he had fired two shots (65:23), and that he initially lied to police when he said that Stuart had been at his home on the night in question (65:24). *See Van Arsdall*, 475 U.S. at 684 (in conducting a harmless-error analysis, a court may consider "the extent of cross-examination otherwise permitted").

B. Five other witnesses testified that Stuart admitted the murder.

The evidence that Stuart admitted killing Gary Reagles did not come only from John's preliminary hearing testimony. Five witnesses other than John testified at trial that they, too, heard Stuart admit the murder.

- Arthur Parramoure, whose ex-wife is Stuart's niece, testified that he and Stuart drove to Arizona a few days after the death of Gary Reagles (56:24). Parramoure testified that while they were driving through Oklahoma, Stuart said that he shot Mr. Reagles during an argument over a gun that Stuart had given to Mr. Reagles (56:24-25). Parramoure also testified that the next day, Stuart asked Parramoure if he remembered what Stuart had told him and said that "he was just bull shit[t]ing" about that (56:25). When Stuart testified in his own defense, he admitted that "for some ungodly reason, I did tell [Parramoure] that I shot Gary Reagles" (65:151).

- Michael Schultz testified that in March of 1990, he met Stuart in a bar in Kenosha and was purchasing a gold coin from him when Stuart said that he "had to" kill Mr. Reagles (56:44). Schultz testified that either Stuart or Stuart's brother Larry said that the killing had happened the previous night (56:44-45).

- David Small testified that when he was sharing a jail cell with Stuart in September of 1998, Stuart told him that he had shot a man in the chest with a 9-mm gun, that

he made it look like a suicide, that the police found powder burns on the victim's hands, that he put the gun by the victim's feet, that the victim had a history of suicide attempts, and that he shot the victim in a dispute over stolen property and money (56:65). Small further testified that Stuart told him that he had spoken to his (Stuart's) brother and nephew about what had happened (56:65-66). Small testified that Stuart told him that there was no physical evidence and that the state only had hearsay evidence against him (56:66-67).

- Benjamin Woody testified that he was housed in the Kenosha County Jail with Stuart on October 5, 1998, when Stuart began talking about his case. According to Woody's testimony, Stuart said that "they can't prove it" because the death had been ruled a suicide and there was no forensic evidence, but that Stuart said, "I killed him, and I would kill him again" (56:101-02).

- Damian Simpson was present during that October 5, 1998, conversation (56:137-38). He testified that Stuart said that "he killed the bastard, and he would do it again" (56:138).

The court of appeals recognized the importance of these other prosecution witnesses when it held that if the trial court had erred when it refused to take judicial notice of the charges against John, that error was harmless.

> Even if the evidentiary ruling were error, it was harmless. An "error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ... Four other witnesses testified that Stuart told them he shot Reagles. Therefore, impeaching John with evidence of pending criminal charges and implications of a side arrangement with the State to testify against Stuart would not have affected the other evidence against Stuart.

Stuart II, slip op. at ¶13 (citation omitted) (A-Ap. 107).

The court of appeals was correct, although the actual number of witnesses other than John who testified that Stuart admitted the shooting was five, not four. The trial court also agreed with that assessment. At the hearing on the postconviction motion, Stuart's counsel argued that Stuart was entitled to a new trial based on newly discovered evidence because this was a close case and it "doesn't take very much gold dust on an even scale to tilt it the other way" (105:24). Judge Fisher, who presided over the trial, emphatically disagreed, stating, "I think it was anything but a close case" (105:25).

Even if Stuart had been able to cast serious doubt on John's credibility, there remains the fact that five other witnesses also testified that Stuart confessed to shooting Gary Reagles. The jury saw and heard those other five witnesses and apparently found their evidence credible. The jury also heard at length from Stuart himself (65:107-57; 67:3-75) and did not believe him.

Given the minimal impeachment value of the evidence that Stuart was unable to elicit as a result of the restriction on his cross-examination of John and the testimony of the five other witnesses, it is clear beyond a reasonable doubt that a rational jury would have found Stuart guilty absent the confrontation clause error. Accordingly, the court should conclude that while the admission of John's preliminary hearing testimony violated the confrontation clause under the newly announced *Crawford* standard, that error was harmless.

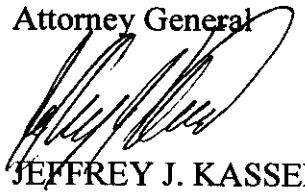
CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 9th day of August, 2004.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,763 words.

Dated this 9th day of August, 2004.

JEFFREY J. KASSEL
Assistant Attorney General

INDEX TO APPENDIX

2003 WI 73

No. 01-1345-CR
(L.C. No. 98 CF 708)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent,

v.

Paul J. Stuart,

Defendant-Appellant.

FILED

JUL 1, 2003

Cornelia G. Clark
Clerk of Supreme Court

APPEAL from an order of the Circuit Court for Kenosha County, Michael S. Fisher, Judge. *Affirmed and remanded for further proceedings.*

¶1 JON P. WILCOX, J. This case comes before the court on certification from the court of appeals pursuant to Wis. Stat. (Rule) § 809.61 (1999-2000). The overriding issue requiring our examination is whether a previous order entered by the court in this case establishes the "law of the case."

¶2 The legal questions raised here revolve around the propriety of admitting a witness's preliminary hearing testimony in a criminal trial. In February 1999, Paul Stuart, the defendant, was convicted of first-degree intentional homicide.

He was convicted following a jury trial in which the Kenosha County Circuit Court, Michael S. Fisher, Judge, allowed the preliminary hearing testimony of the defendant's brother, John Stuart, to be read into evidence. The circuit court had initially excluded this preliminary hearing testimony. However, the State sought immediate review of that ruling. The court of appeals summarily affirmed the circuit court's ruling, but this court granted the State's emergency petition for review and reversed the court of appeals.

¶3 The defendant now asserts that this court's previous order did not establish the law of the case because it involved a mere discretionary ruling and did not state reasons for its reversal of the court of appeals. These are the issues specifically raised by the court of appeals' certification.[1] We hold that our previous ruling did establish the law of this case. We also conclude that although this court has the authority to make an exception to the law of the case doctrine under certain circumstances, such circumstances do not exist in this case. We therefore affirm the circuit court's judgment of conviction.

[1] Stuart raised other issues in his appeal. The court of appeals noted these issues in its certification to this court, but specifically stated: "We deem none of these issues worthy of certification."

¶4 The defendant also raises numerous other issues on appeal.[2] We remand these issues for consideration by the court of appeals.

I. BACKGROUND

¶5 The relevant facts are undisputed. As noted, this case is now before us for the second time. To better understand the issues presented, we discuss the relevant facts surrounding our first decision as well as those leading up to our review on certification.

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[2] According to the defendant's brief, the other questions he raises on appeal are as follows:

> 1) Whether trial counsel was ineffective where he failed to stipulate to a pending subornation of perjury charge by John Stuart?
>
> 2) Whether the trial court erred for failing to inform the jury concerning the significant criminal charges John Stuart was facing at the time he gave a statement?
>
> 3) Whether the trial court erred when it barred the defendant from arguing John Stuart's bias?
>
> 4) Whether or not new evidence warrants a new trial?
>
> 5) Whether the failure of defense counsel to inform the jury that Arthur Parramoure had a criminal conviction would entitle defendant to a new trial?
>
> 6) Whether trial counsel was ineffective for failing to object to evidence of the nature of Paul Stuart's criminal convictions?
>
> 7) Whether Paul Stuart's conviction should be reversed in the interest of justice?

(Def's. Brief at 1-2.)

¶6 On March 27, 1990, Gary Reagles was found dead in his apartment with a gunshot wound to the chest. A Berretta nine millimeter gun was found on the floor near the body. Reagles had a history of emotional problems and his girlfriend told police that he had been threatening suicide because of their impending breakup. His death was initially ruled a suicide.

¶7 In 1998, Paul Stuart (Paul) was charged with the first-degree intentional homicide of Reagles. A preliminary hearing was held on August 13, 1998, and included testimony by Paul's brother, John Stuart (John), implicating Paul in the shooting.

¶8 John testified at the preliminary hearing that between 5:00 and 7:00 a.m. on the morning Reagles' body was found, Paul came to his house and spoke with him. Paul told him that he had been out partying with Reagles the night before, drinking and getting high on cocaine. John then testified that about a half hour into the early morning conversation with Paul, Paul admitted to him that he shot Reagles because he was going to say something about a burglary perpetrated a week or two before by John and Paul.

¶9 John testified that he and Paul had robbed a home in Illinois a short time before Reagles' death. They had stolen coins, pocketknives, and some guns. One of the guns was a Berretta nine millimeter. John testified that Paul had possession of that particular weapon following the burglary. According to John's testimony, Paul appeared to be scared, distraught, and confused when talking to him about the shooting.

John testified that Paul told him that after he shot Reagles, he "fixed it to look like a suicide."

¶10 John stated that later on the same day, George Stuart, another of the Stuart brothers, came over and told him that Reagles had been found dead in his apartment. Reagles was the son of George Stuart's girlfriend. Paul was there when George Stuart told John about Reagles' death. John testified that Paul acted surprised when told about the shooting, as if he knew nothing about it. Later, Paul asked John to provide him with an alibi. He asked John to say that he had been at John's home at the time of the shooting. Finally, John testified that Paul left the state on a trip to Arizona within a week of Reagles' death.

¶11 On cross-examination, John acknowledged that defendant's trip to Arizona was not unusual since their mother lived there. He acknowledged that he first told police about the information he had regarding Reagles' death when he was stopped for a traffic offense in 1992 or 1993. He stated that he gave another statement to police in June of 1998.[3] The defense counsel then asked about the circumstances under which John gave this statement, which drew an objection from the State. The exchange regarding that June 1998 statement was as follows:

[3] According to the record, John gave a third statement to police on April 21, 1998, relating to the information he had about his brother's involvement in Reagles' death.

Q Did you have occasion to give that [information you testified to today] to Detective Tappa in June of this year?

A Did I?

Q Yes.

A Yes.

Q And under what circumstances did you do that?

MR. JAMBOIS: Objection. Irrelevant.

MR. SUMPTER: It's very relevant under what circumstances the statements that he has testified to as they relate to the criminal complaint in the statement in June 1, 1998.

MR. JAMBOIS: It's discovery. Your Honor, it pertains to credibility, but not to plausibility.

COURT: I think it goes to the credibility issue certainly, and it certainly is discovery. So the objection is sustained.

¶12 Following the objection, defense counsel continued his questioning. Under continued questioning, John testified that he was "stoned" when Paul told him about shooting Reagles. He also testified that after his conversation with Paul, he smoked five or six additional marijuana cigarettes. John admitted being confused during the conversation and did not believe what Paul told him. He also admitted being confused when George came over with the news of Reagles' death, because Paul acted like he had no prior knowledge of it.

¶13 John also admitted telling police that Paul told him that there were two shots fired. He acknowledged lying for Paul when he told officers that Paul was at his home the day of the shooting.

¶14 After hearing testimony from John and another witness, Arthur Parramoure, who testified that Paul confessed to shooting Reagles, the case was bound over for trial. Paul had new counsel at trial because the attorney representing him at the preliminary hearing, Mr. Sumpter, passed away.

¶15 Trial began on February 8, 1999. On the third day of trial, John took the witness stand and asserted his Fifth Amendment right against self-incrimination. He refused to answer questions, and persisted in the refusal despite the State's offer of use immunity for his testimony and the court's warning that he could be held in contempt of court. In response to questioning from the court, John acknowledged that he feared perjury charges. The court held John in contempt of court. The State then moved to have John's preliminary hearing testimony offered into evidence.

¶16 On February 11, 1999, after a motion hearing, the circuit court ruled that John's preliminary hearing testimony was inadmissible. The State immediately appealed. By order dated February 16, 1999, the court of appeals summarily affirmed the circuit court's ruling, finding that the State properly filed a notice of appeal under Wis. Stat. § 974.05(1)(d)2 (1997-98)[4] and that "an unusual circumstance" existed in the case such that the opportunity to cross-examine at the preliminary hearing was insufficient to satisfy the constitutional right to

[4] All subsequent references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

confrontation. The State then filed an emergency petition for review with this court, which we accepted. This court ordered the trial stayed, pending a decision by the court. Thus, in the middle of the trial, after a jury had been selected and jeopardy attached, everything in the case stopped to await an answer from the appellate courts on the issue of the admissibility of John's preliminary hearing testimony.

¶17 The parties submitted briefs and this court held oral argument on February 23, 1999. The same day, following oral argument, this court issued an order reversing the decision of the court of appeals. That order provided, in full:

> On February 19, 1999, this court granted the emergency petition for review filed by the State of Wisconsin and also granted the State's request for a stay of the criminal trial that was currently in process in Kenosha County Circuit Court.
>
> The circuit court, Michael S. Fisher, Judge, declared John Stuart, the defendant's brother, an unavailable witness due to his invocation of his Fifth Amendment privilege against self-incrimination. John Stuart testified at the preliminary hearing that the defendant told him he shot the victim and sought John's assistance in creating a false alibi. The circuit court denied the state's motion to admit John Stuart's preliminary examination testimony as former testimony under § 908.045(1), Stats., on the grounds that John Stuart was not subject to effective cross-examination by defense counsel at the preliminary hearing.
>
> The State filed both a notice of appeal and a petition for leave to appeal. The court of appeals concluded that the notice of appeals was properly filed under § 974.05(1)(d)2, Stats., and it dismissed the petition for leave to appeal. The court of appeals summarily affirmed the circuit court's order denying the state's motion to admit John Stuart's

preliminary hearing testimony under § 908.045(1), Stats.

Having considered the parties' briefs and heard oral argument;

IT IS ORDERED the court of appeals' order is reversed.

IT IS FURTHER ORDERED the stay of the criminal trial is lifted.

C.J. Abrahamson and JJ. Bablitch and Bradley dissent and would dismiss the petition as improvidently granted. In the alternative, JJ. Bablitch and Bradley would affirm.

State v. Paul J. Stuart, No. 99-0432-CR, unpublished order (Wis. Feb. 23, 1999).

¶18 Following this court's ruling, the murder trial resumed. Based on our reversal of the court of appeals' decision, the circuit court had John's preliminary hearing testimony read into the record. The defendant was subsequently convicted of first-degree intentional homicide in violation of Wis. Stat. § 940.01(1) (1989-90). He was sentenced to life imprisonment, with parole eligibility in the year 2029.

¶19 The defendant filed a motion for postconviction relief, which was denied. He appealed, and the court of appeals certified the case to this court, identifying two specific issues:

1. When an appellate court issues an opinion resolving a discretionary ruling of the circuit court, is its decision the law-of-the-case?

2. Whether an unpublished Wisconsin Supreme Court order reversing a decision of the court of appeals, without providing legal reasoning or

legal authorities, establishes the law-of-the-case?

As we have previously noted, the defendant also raised a variety of other claims in his appeal, which the court of appeals specifically noted it did not "deem . . . worthy of certification." This court accepted certification of all claims from the court of appeals on December 11, 2002.

II. STANDARD OF REVIEW

¶20 As noted, this case centers around the admissibility of a witness's former testimony and the impact of this court's prior decision to reverse the court of appeals' decision which affirmed the circuit court's ruling to exclude the evidence. The issue of whether a decision establishes the law of the case raises a question of law that we review de novo. See State v. Wurtz, 141 Wis. 2d 795, 799, 416 N.W.2d 623 (Ct. App. 1987).

¶21 Generally, the admissibility of former testimony is a discretionary decision of the circuit court that will not be overturned unless clearly erroneous. State v. Tomlinson, 2002 WI 91, ¶39, 254 Wis. 2d 502, 648 N.W.2d 367 (citing La Barge v. State, 74 Wis. 2d 327, 246 N.W.2d 794 (1976)). However, the question of whether a defendant's right to confrontation has been violated is one of constitutional fact, subject to independent appellate review. Id. (citing State v. Jackson, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998)); see also State v. Williams, 2002 WI 58, ¶69, 253 Wis. 2d 99, 644 N.W.2d 919. We will "adopt the circuit court's findings of historical fact, unless they are clearly erroneous, but we independently apply

those facts to the constitutional standard." Tomlinson, 254 Wis. 2d 502, ¶39.

III. DISCUSSION

¶22 Our first determination must be whether the prior decision of this court established the law of the case. As the court of appeals' certification questions make apparent, there are two arguments related to this issue. The defendant asserts that the circuit court should not have been bound by this court's ruling as the law of the case because 1) this court's decision dealt with a discretionary decision rather than a rule of law; and 2) this court did not state any reasons.

¶23 The law of the case doctrine is a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." Univest Corp. v. General Split Corp., 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989) (internal citation omitted). Thus, a circuit court is generally bound to apply decisions made by the court of appeals or supreme court in a particular case. See id.; see also Oladeinde v. City of Birmingham, 230 F.3d 1275, 1288 (11th Cir. 2000) (noting that in the federal system, the law of the case doctrine binds district courts and appellate courts to prior appellate decisions in the same case). The purpose of the law of the case doctrine is not complex: "The doctrine of 'law of the case' is rooted in the concept that courts should generally follow earlier orders in the same case and should be reluctant to change decisions already made, because

encouragement of change would create intolerable instability for the parties." Ridgeway v. Montana High School Ass'n, 858 F.2d 579, 587 (9th Cir. 1988) (internal citations omitted).

¶24 However, the rule is not absolute. In days past, Wisconsin rigidly followed the law of the case, refusing to touch issues previously determined, but that is no longer the case. See State v. Brady, 130 Wis. 2d 443, 447, 388 N.W.2d 151 (1986) (citing McGovern v. Eckhart, 200 Wis. 64, 227 N.W.2d 300 (1929), for the proposition that the tradition to strictly follow the law of the case doctrine was to be applied more flexibly in the future).[5] As this court has found: "[T]he law of the case doctrine is not a rule to which this court is bound by any legislative enactment, nor is it a rule to be inexorably followed in every case." Univest, 148 Wis. 2d at 38-39. There are now certain circumstances, when "'cogent, substantial, and proper reasons exist,'" under which a court may disregard the doctrine and reconsider prior rulings in a case. Id. (internal citations omitted). This court has found that a court should adhere to the law of the case "unless the evidence on a subsequent trial was substantially different, [or] controlling authority has since made a contrary decision of the law applicable to such issues." Brady, 130 Wis. 2d at 448 (brackets

[5] But see Scott Doney, Note, Law of the Case in Nevada: Confusing Relatives, 2 Nev. L. J. 675, 677 (2002) (finding that Nevada still adheres to a strict law of the case doctrine wherein it lacks authority to revisit issues and "even if the prior ruling is erroneous, no longer sound, or might work a manifest injustice, the court refuses to reconsider the issue").

in original) (citing White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967)). More broadly, this court has found that "It is within the power of the courts to disregard the rule of 'law of the case' in the interests of justice." Id. at 447 (internal quotations and citations omitted). The Supreme Court and other courts have stated similar reasons. See Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 817 (1988) (citation omitted) (noting that a court should "be loathe" to reconsider previous decisions it or a coordinate court has rendered "in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice'"); Oladeinde, 230 F.3d at 1288 (allowing reconsideration if "new and substantially different evidence is produced, or there has been a change in controlling authority" or if the prior decision "was clearly erroneous and would result in a manifest injustice"); Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1134 (D.C. Cir. 1994).

¶25 In Christianson, 486 U.S. at 817, the United States Supreme Court held that application of the law of the case doctrine "turns on whether a court previously 'decide[d] upon a rule of law' . . . not on whether, or how well, it explained the decision." Paul argues first that this court's prior ruling was a discretionary decision rather than a determination upon a rule of law, and as such, the law of the case doctrine cannot be applied to bind the circuit court. In support of his argument, the defendant cites to the Wurtz decision by the court of appeals.

¶26 In Wurtz, 141 Wis. 2d at 800, the court of appeals held that "when an appellate court affirms a discretionary ruling, its decision does not reflect the law of the case unless a question of law is resolved." The court went on to explain:

> We hold that the subsequent trial court on remand is not limited to the discretionary decisions made by the original court, but is bound only to apply the law determined by the appellate court in reaching a reasoned conclusion. Judicial discretion is by definition an exercise of proper judgment that could reasonably permit an opposite conclusion by another judge.

Id. Wurtz acknowledged that issues determined "as a matter of law" are binding upon the circuit court. Id.

¶27 We disagree with defendant's assertion that this court's decision did not involve resolution of a question of law. Although no reasons were stated in the order, the issue before the court was defined and a decision made. As noted in Wurtz, an affirmance of a discretionary ruling may not require a court to determine a question of law. See id. However, we believe that a reversal such as the one in this case necessarily entails a determination on a rule of law, because to reverse the court we must find the circuit court's ruling outside the realm of discretion. See Donald Songer et al., Nonpublication in the Eleventh Circuit: An Empirical Analysis, 16 Fla. St. U. L. Rev. 963, 976 (1989) ("When a reversal occurs in a case, inevitably it involves a question of law, with the court addressing a legal

mistake from below.").[6] The issue presented in that appeal was confined to a narrow legal issue defined by the court of appeals, namely, whether the limitation upon cross-examination—not allowing defense counsel to ask about the circumstances under which John Stuart gave one of his statements to police—constituted an "unusual circumstance," such that the constitutional right to confrontation would be violated and the preliminary hearing testimony inadmissible. The court of appeals determined that it did constitute an "unusual circumstance." In our order issued on February 23, 1999, we laid out the circumstances of the case and the findings by the circuit court and the court of appeals. By subsequently reversing the court of appeals, we at least implicitly found, as a matter of law, that the circumstances presented were not "unusual" and should not operate to prevent admission of the preliminary hearing testimony. Because this decision was a reversal and inherently included determination of a "rule of law," we conclude that Wurtz is inapplicable.

¶28 As previously stated, the defendant also argues that this court's order reversing the court of appeals cannot establish the law of the case because it stated no reasons for

[6] Interestingly, the author of this article is arguing that courts need to give reasons for their decisions, because many cases of "precedential value are ending up in unpublished opinions." Songer et al., Nonpublication in the Eleventh Circuit: An Empirical Analysis, 16 Fla. St. U. L. Rev. 963, 976 (1989). We agree that in most cases it is appropriate to provide explicit explanations for decisions. The case at hand, however, was an exception necessitated by exigent circumstances.

the decision. This argument must also fail. There is nothing that requires this court to state its reasons. The United States Supreme Court has made clear that reasons are not necessary for the law of the case doctrine to apply. Again, as it stated in Christianson, 486 U.S. at 817: "That the Federal Circuit did not explicate its rationale is irrelevant, for the law of the case turns on whether a court previously 'decide[d] upon a rule of law' . . . not on whether, or how well, it explained the decision." (Emphasis added.) Other courts have held similarly. See, e.g., Al Tech Specialty Steel Corp. v. Allegheny Int'l Credit Corp., 104 F.3d 601, 605 (3d Cir. 1997) (noting that the "law of the case doctrine applies to this decision even though it was rendered by judgment order"). Further, although the court of appeals is required to include a written opinion with reasons for its decision, see Wis. Stat. § 752.41(1),[7] there is not an identical rule for the Wisconsin Supreme Court. The rule relevant to Wisconsin Supreme Court decisions, Wis. Stat. § 751.10, provides:

> **Decisions to be written; part of record; certification.** The supreme court shall decide all cases in writing. One copy of each written decision or opinion delivered by the court or a justice in an action or proceeding in the court shall remain in the office of the clerk of the supreme court and one copy shall constitute a part of the record in the action or proceeding and shall be certified to a court of the

[7] Wisconsin Stat. § 752.41(1) provides: "In each case, the court of appeals shall provide a written opinion containing a written summary of the reasons for the decision made by the court."

> United States to which the action or proceeding is certified or removed.

Although this rule requires our decisions to be in writing, nothing in the rule mandates that we give reasons. See Neely v. State, 89 Wis. 2d 755, 758, 279 N.W.2d 255 (1979) ("The word decision, as used in the statutes and the rules, refers to the result (or disposition or mandate) reached by the court of appeals [or supreme court] in the case."). We certainly agree that it is generally good practice for courts to give reasons, but maintain that nothing requires the court to do so. Here, the emergency conditions precipitating this court's prior ruling, specifically that jeopardy had already attached and trial was underway when the matter was stayed for appellate review, and the narrow issue to be decided excuse the lack of any explicit rationale. This court accepted the case on February 19, 1999, heard oral argument on February 23, 1999, and issued a decision on February 23, 1999. Expediency was required because the trial was stayed until this court reached a decision.

¶29 We now turn to the final point of discussion, whether we should find an exception to the law of the case doctrine in this case, because there exist "cogent, substantial, or proper reasons" to put aside its application, such as substantially different evidence, new case law, or some sort of miscarriage of justice stemming from our prior ruling. We find that no such circumstances exist. Nothing in this case has changed. In fact, the defendant's primary focus in arguing that this court

should not apply the law of the case doctrine is that this court simply erred in making its determination the first time. In abandoning a rigid application of the law of the case doctrine, this court has held that we will "not deny to litigants or ourselves the right and duty of correcting an error merely because of what we may be later convinced was merely our ipse dixit in a prior ruling in the same case." McGovern, 200 Wis. at 77. Thus, we will review the merits of the defendant's confrontation claim to determine if, as the United States Supreme Court has described, "'extraordinary circumstances' [exist] such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" Christianson, 486 U.S. at 817 (internal citation omitted).

¶30 Paul argues that his brother's preliminary hearing testimony should not have been admitted into evidence because he was not allowed adequate opportunity to cross-examine the witness at the preliminary hearing. We find, as we did in our previous ruling in this case, that John's preliminary hearing testimony should have been, and properly was, admitted into evidence.

¶31 John asserted his Fifth Amendment privilege during Paul's trial and refused to answer questions posed by the State. The State offered him use immunity for his testimony, but John persisted in asserting his rights and would not testify regarding the charges against Paul. The court eventually held John in contempt of court. The State then moved to have John's preliminary hearing testimony read into evidence.

¶32 Paul claims that admission of John's former testimony would violate his constitutional right to confrontation, as guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. The Sixth Amendment confrontation clause of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Similarly, Article I, Section 7 of the Wisconsin Constitution provides: "In all criminal prosecutions the accused shall enjoy the right . . . to meet the witnesses face to face." In State v. Bauer, 109 Wis. 2d 204, 325 N.W.2d 857 (1982), this court held that the purpose of the confrontation clause "is to ensure that the trier of fact has a satisfactory basis for evaluating the truthfulness of evidence admitted in a criminal case." Although the rule is very important, we have recognized that it is not absolute. Id. at 208. Were it to be held absolute, virtually all evidence admissible under a hearsay exception would violate the confrontation clause. Id. at 209. Thus, a balance must be made, weighing the admission of evidence against the defendant's right to confrontation.

¶33 In Bauer, 109 Wis. 2d 204, this court established a test for determining when hearsay evidence is admissible without violating a defendant's constitutional right to confrontation. We explained:

> The threshold question is whether the evidence fits within a recognized hearsay exception. If not, the

> evidence must be excluded. If so, the confrontation clause must be considered. There are two requisites to satisfaction of the confrontation right. First, the witness must be unavailable. Second, the evidence must bear some indicia of reliability. If the evidence fits within a firmly rooted hearsay exception, reliability can be inferred and the evidence is generally admissible. This inference of reliability does not, however, make the evidence admissible per se. The trial court must still examine the case to determine whether there are unusual circumstances, which may warrant exclusion of the evidence. If the evidence does not fall within a firmly rooted hearsay exception, it can be admitted only upon a showing of particularized guarantees of trustworthiness.

Id. at 215. We have since applied this test on several occasions. See, e.g., State v. Norman, 2003 WI 72, ___ Wis. 2d ___, ___ N.W.2d ___; Tomlinson, 254 Wis. 2d at ¶¶39-52.

¶34 As described above, the first step of the analysis is to determine whether the evidence fits within a recognized hearsay exception. Former testimony, such as John's preliminary hearing testimony, falls under Wis. Stat. § 908.045, which provides:

> **Hearsay exceptions; declarant unavailable.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

Paul does not dispute that this is a recognized hearsay exception. There is also no dispute in this case that the

witness is, indeed, unavailable as defined in Wis. Stat. § 908.04(1)(b), because he asserted his Fifth Amendment rights, refusing to answer questions even after being offered use immunity and being warned that he could be held in contempt.

¶35 The question that remains is whether John's preliminary hearing testimony meets the requirements of Wis. Stat. § 908.045. See Tomlinson, 254 Wis. 2d 502, ¶45. We believe that it does. The testimony was given at a preliminary hearing in which the defendant was given an opportunity to develop the testimony by "direct, cross-, or redirect examination" as required by § 908.045. Although the scope of the cross-examination was somewhat limited by the scope of preliminary hearings, Paul was able to challenge the witness's veracity on cross-examination. Indeed, only one objection was sustained during the cross-examination. Additionally, testimony relating to credibility came up during the direct examination of John as well. On direct examination, John admitted participating in a burglary. On cross-examination, John admitted drug use, confusion while talking to Paul about Paul's possible involvement in the shooting, and the fact that he lied to police. We find that the questioning was sufficient to satisfy the requirements of § 908.045. We will discuss the testimony and the extent of cross-examination more fully in looking at whether the requirements of the confrontation clause have been satisfied.

¶36 Having found that John's preliminary hearing testimony is admissible under § 908.045, we now turn to examination of the confrontation clause. As noted, Bauer, 109 Wis. 2d at 215, states that there are two requisites for satisfying the confrontation clause: 1) the witness must be unavailable; and 2) the evidence must "bear some indicia of reliability." The parties have agreed that the witness is unavailable. According to Bauer, reliability can be inferred if the evidence fits within a "firmly rooted" hearsay exception. Id. This court then went on to find that the United States Supreme Court recognized in Ohio v. Roberts, 448 U.S. 56 (1980), that preliminary hearing testimony does fall into a "firmly rooted" hearsay exception. Bauer at 216.

¶37 Such a finding does not, however, end the analysis. As Bauer noted, the inference of reliability does not mean the evidence is admissible per se. Id. at 215. Rather, we examine the case to determine if any unusual circumstances exist that would undermine the inference of reliability and warrant exclusion of the evidence. Id. This particular portion of the analysis has been the heart of the defendant's argument relating to alleged violation of the confrontation clause since the admissibility was first contested and appealed to this court in 1999. We now find, as we did then, that no unusual circumstances exist here that require exclusion of John's preliminary hearing testimony.

¶38 Paul argues that because he was not allowed to ask the circumstances under which John made his June statement to

police, his constitutional right to confrontation was violated. As noted, this question by defense counsel, regarding the circumstances of John's June statement, drew the only objection during cross-examination. The court ruled that the question related to credibility and discovery and was beyond the scope of testimony allowed at a preliminary hearing and was, therefore, not allowed.

¶39 The defendant's argument here is not a new one. Numerous defendants have complained of a limited opportunity to cross-examine. See, e.g., Ohio v. Roberts, 448 U.S. at 68-72; Bauer, 109 Wis. 2d at 216. We acknowledge that preliminary hearings are not the same as full trials, because cross-examination at a preliminary hearing is limited to the issue of probable cause. See Bauer, 109 Wis. 2d at 217. There have been cases where preliminary hearing testimony has been excluded on the basis of "unusual circumstances." For example, in People v. Brock, 695 P.2d 209, 219-220 (Cal. 1985), the Supreme Court of California excluded the preliminary hearing testimony of a witness because the witness's serious illness greatly limited the defense's ability to cross-examine her and test her recollection of relevant events. In Pointer v. Texas, 380 U.S. 400 (1965), the United States Supreme Court held that preliminary hearing testimony must be excluded where the defendant was not represented by counsel at the proceeding. Nonetheless, this court has found that limitation of cross-examination due to the scope of preliminary hearings does not render evidence inadmissible. Bauer, 109 Wis. 2d at 218. We

have stated that "'[i]n upholding the introduction of an unavailable witness' preliminary hearing testimony, the Supreme Court has never said that the opportunity for cross-examination afforded at the preliminary hearing must be identical with that required at trial.'" Id. (quoting United States ex rel. Haywood v. Wolff, 658 F.2d 455, 461 (7th Cir. 1981), cert. denied, 454 U.S. 1088 (1981)).

¶40 In Bauer, we noted that the procedural circumstances of the preliminary hearing are indicative of whether or not there is a basis for upholding the inference of reliability. Id. at 219. Citing Roberts, 448 U.S. at 73, and California v. Green, 399 U.S. 149, 165 (1970), two cases by the United States Supreme Court, we noted several circumstances as important: 1) the witness was under oath at the preliminary examination; 2) the witness was subject to cross-examination; 3) the proceedings were conducted before a judicial tribunal; and 4) the proceedings were recorded. Bauer, 109 Wis. 2d at 219. We then found: "These accoutrements of the preliminary examination provide an assurance of trustworthiness." Id.

¶41 This court examined a very similar set of circumstances in Tomlinson, 254 Wis. 2d 502, ¶¶46-52. In finding that admission of the evidence did not violate the defendant's confrontation rights, we again focused on the circumstances at the preliminary hearing:

> Coleman's testimony was given under oath, before a judicial tribunal, and in a setting equipped to make a judicial record. Tomlinson was already represented by counsel at the preliminary hearing—the same attorney

> who later represented Tomlinson at trial. Additionally, Tomlinson's defense counsel had an opportunity to cross-examine Coleman at the preliminary hearing. During the cross-examination, the defense attorney was able to elicit information helpful to Tomlinson's defense, including the fact that Coleman did not call the police after the incident, that Coleman did not see whether Tomlinson struck Phillips a third time because he had been leaving the scene at the time, and that Coleman had been drinking on the day of the incident. Thus, we find Tomlinson's ability to cross-examine Coleman was meaningful.

Id., ¶51. Though Tomlinson's right to cross-examine the relevant witness was limited by the preliminary hearing context, we found that the cross-examination that occurred was sufficient for purposes of the confrontation clause. Id. The same is true here. As we have noted, there was only one objection made during the cross-examination. This objection stopped the defendant from asking about the circumstances under which John made a statement to police in June 1998. We acknowledge that unlike some cases, John's credibility is an important issue in the case. However, John's testimony at the preliminary hearing and the circumstances surrounding it were sufficient to satisfy the requirement that there be indicia of reliability. First, John's testimony was taken under oath. Paul was represented by counsel at the hearing. He had different counsel at trial, but both this court and the United States Supreme Court have found that this is a meaningless distinction. See Roberts, 448 U.S. 56, 72; Bauer, 109 Wis. 2d at 219 n.10. Defense counsel was able to meaningfully cross-examine John. He directly challenged the substance of John's statements. For example, he got John to

admit that he was under the influence of drugs at the time Paul allegedly confessed to him. He admitted that he was a drug user and that on the morning Paul confessed to shooting Reagles, he was confused and smoked additional marijuana after talking to Paul. Defense counsel was able to point out inconsistencies in John's version of the facts. John stated that Paul told him the gun was fired twice. Reagles was shot only once. Defense counsel also got John to admit that he lied to police. These questions are sufficient to give the jury a basis from which to determine John's reliability. Additionally, on direct examination, John admitted to participating in a burglary, and stealing coins, pocketknives, and several guns. Based on the circumstances of the preliminary hearing, we are satisfied that the requirement of indicia of reliability is satisfied, and that there are no unusual circumstances here warranting exclusion of the evidence and reversal of our original decision in this case.

¶42 Having resolved the law of the case questions, we remand all other issues raised by the defendant back to the court of appeals for consideration consistent with this opinion.

¶43 Because we find that our original decision necessarily included a determination on a rule of law and further, that we were not required to provide reasons for our decision, we find our prior ruling, requiring the circuit court to admit the preliminary hearing testimony of an unavailable witness, established the law of this case. In addition, we find that there are no circumstances here that merit us finding an

exception to the law of the case doctrine. For these reasons, we affirm the ruling of the circuit court.

By the Court.—The judgment of the circuit court is affirmed and all remaining issues are remanded to the court of appeals for further proceedings consistent with this opinion.

¶44 SHIRLEY S. ABRAHAMSON, CHIEF JUSTICE *(concurring in part, dissenting in part)*. I agree with the court's disposition of the issues reached in the opinion. I write to comment on two other aspects of the majority opinion.

¶45 First, I would not remand the remaining issues to the court of appeals for decision. These issues were presented and briefed to this court. This court should decide them.

¶46 Second, on reflection I believe that this court should have given a reason for our previous ruling, even in an emergency situation. We shall have to try harder in the future.

I

¶47 This case is here on certification from the court of appeals. When this court takes jurisdiction over an appeal upon certification from the court of appeals, the court takes jurisdiction of the entire appeal.[1] The court of appeals does not certify, and this court does not take jurisdiction over, discrete legal questions within the appeal.[2]

¶48 Although I believe this court has the power to remand issues to the court of appeals, I would have this court decide the entire appeal in this case in the interest of judicial economy, speedy resolution of appeals, reduced costs to the litigants, and finality of decisions. Remand is a wasteful duplication of decisional effort, even when, as in this case,

[1] Majority op., ¶19.

[2] See Wis. Stat. § (Rule) 809.61.

the court of appeals did not consider the issues being remanded as worthy of certification.[3]

¶49 We are familiar with the parties' arguments. We are familiar with the record. Having decided several issues puts us in a better position than the court of appeals to decide the remaining issues with minimum delay and maximum efficiency.[4] No reason exists why we could not render a decision on the remaining issues today.

¶50 Our remand to the court of appeals will delay the final decision on these issues. The court of appeals will have to go over the briefs and the record we have already laboriously reviewed, and the losing party on the remaining issues in the court of appeals may seek further review in this court, causing

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[3] See Crown Life Ins. Co. v. LaBonte, 111 Wis. 2d 26, 45, 330 N.W.2d 201 (1983) (Abrahamson, J., concurring and dissenting).

[4] The question whether this court should decide all issues or remand some to the court of appeals arises in certifications, like this case, or in cases before us on petition for review. In the latter type of case the court of appeals may have decided only the determinative issues and may not have addressed the other issues raised on appeal. If this court reverses the court of appeals on the determinative issues, the parties are entitled to appellate review on the remaining issues. Sometimes this court decides these remaining issues if briefed and other times we remand them to the court of appeals. See, e.g., State v. Sarabia, 118 Wis. 2d 655, 674, 348 N.W.2d 527 (1984) (Abrahamson, J., concurring and dissenting); Soquet v. Soquet, 117 Wis. 2d 553, 561, 345 N.W.2d 401 (1984) (Abrahamson, J., concurring); Shopper Advertiser, Inc. v. DOR, 117 Wis. 2d 223, 240, 344 N.W.2d 115 (1984) (Abrahamson, J., concurring and dissenting); Radtke v. City of Milwaukee, 116 Wis. 2d 550, 558, 342 N.W.2d 435 (1984) (Abrahamson, J., concurring and dissenting); LaBonte, 111 Wis. 2d at 45 (Abrahamson, J., concurring and dissenting).

additional delay. Should we accept that party's petition for review, we will find ourselves, years later, where we are today.

II

¶51 I agree with the majority opinion that it is good practice for courts to give reasons for their decisions.[5] I have written previously urging the court to explain its decisions. On reflection I think we (myself included) erred in failing to explain our prior order in the present case.

¶52 In deciding legal issues this court owes litigants and the public an explanation for its rulings. A statement of explanation is essential to the judicial decision making process; it is of benefit to judges, litigants, and the public.

> When reasons are announced and can be weighed, the public can have assurance that the correcting process is working. Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated. In a busy court, the reasons are an essential demonstration that the court did in fact fix its mind on the case at hand. An unreasoned decision has very little claim to acceptance by the defeated party, and is difficult or impossible to accept as an act reflecting systematic application of legal principles. Moreover, the necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid.

Paul D. Carrington et al., Justice on Appeal, 10 (1976).

¶53 Ironically, this court commits the same mistake of failing to explain its rulings today. The court remands issues to the court of appeals instead of deciding them itself, without any explanation. In some cases in the past, we have decided all

[5] Majority op., ¶28.

the issues.[6] In other cases in the past, we have remanded issues to the court of appeals.[7] The court has not explained the reason for remand or no remand.[8] Because counsel are unable to predict whether this court will decide issues or remand them to the court of appeals, they are uncertain whether to raise and brief all issues in this court or just request a remand.

¶54 For these reasons, I write separately.

¶55 I am authorized to state that Justice ANN WALSH BRADLEY joins this opinion.

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[6] See, e.g., Sarabia, 118 Wis. 2d at 666.

[7] See, e.g., State v. Marshall, 113 Wis. 2d 643, 656, 335 N.W.2d 612 (1983); State v. McConnohie, 113 Wis. 2d 362, 375, 334 N.W.2d 903 (1983); State v. Derenne, 102 Wis. 2d 38, 48, 306 N.W.2d 12 (1981).

[8] For my explanation of why a remand of issues was appropriate in a particular case, see Soquet, 117 Wis. 2d at 561 (Abrahamson, J., concurring).

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 01-1345-CR

STATE OF WISCONSIN

Plaintiff-Respondent

Trial Court Case
No. LC 98CF708

vs.

PAUL J. STUART,

Defendant-Appellant-Petitioner

APPEAL FROM ORDER DENYING POSTCONVICTION RELIEF DATED APRIL 11, 2001, AND JUDGMENT OF CONVICTION DATED MAY 17, 1999, ENTERED IN THE KENOSHA COUNTY, WISCONSIN CIRCUIT COURT, JUDGE MICHAEL S. FISHER, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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Appellant-Petitioner,
Paul J. Stuart

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In its brief, the State of Wisconsin has conceded that the admission of John Stuart's preliminary hearing testimony violated Paul Stuart's confrontation rights pursuant to the United States Supreme Court's recent decision of Crawford v. Washington, 124 S.Ct. 1354 (2004), a case which fundamentally changed the analysis of a defendant's confrontation clause claims (See State Brief at 3). Finally, that the State agrees that Crawford v. Washington should be applied retroactively to this case because it is still on direct appeal (State Brief at 3). Further, that as Crawford represents a change in controlling authority, the law of the case doctrine does not preclude this court from revisiting Paul Stuart's confrontation clause claim (State Brief at 3).

In spite of these concessions, the State claims that Paul Stuart is not entitled to a new trial because the error in admitting John's preliminary hearing testimony was harmless (See State Brief at 4). As such, the defendant-appellant-petitioner, Paul J. Stuart, will respond in his reply brief to the State's argument that the admission of John Stuart's preliminary hearing testimony was harmless error.

I

THE ADMISSION OF JOHN STUART'S PRELIMINARY HEARING TESTIMONY WAS NOT HARMLESS

A constitutionally improper denial of defendant's opportunity to impeach a witness for bias, is subject to Chatman v. California's harmless-error analysis. Delaware v. van Arsdale, 475 U.S. 673, 684, 89 L.Ed. 2d 674, 686, 106 S.Ct. 1431 (1986), citing Chatman v. California, 386 U.S. 18, 24, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967). The correct inquiry when dealing with confrontation clause errors, is whether, assuming that the damaging potential of cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Id. Whether such an error is harmless in a particular case, furthermore, depends upon a host of factors. Id. These factors include the importance of the witness' testimony in the prosecution's case; whether the testimony was merely cumulative; the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; the extent of cross examination otherwise permitted; and the overall strength of the prosecution's case. Id., citing Harrington v. California, 395 U.S. 250, 254, 23 L.Ed.2d 284, 89 S.Ct.

1726 (1969); Schneble v. Florida, 405 U.S. 427, 432, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972). A constitutional or other error is harmless if it is clear, beyond a reasonable doubt, that the error complained of did not contribute to the verdict obtained. Id. at 680, citing Chatman, 386 U.S. at 24.

In its brief, the State gives two reasons why the admission of John Stuart's preliminary hearing testimony was harmless error. First, the State claims that John Stuart gave the same information to the police in 1992 when no charges were pending and cites to the following facts: At trial, Detective Tappa testified that he had stopped John's vehicle in 1992 (59:8). Further, Detective Tappa testified that he had a conversation with John Stuart following which he wrote a report and turned John Stuart over to another detective (59:9). Detective Tappa, identifying that report at trial, was not asked by the prosecutor or Paul Stuart's trial attorney about the substance of his 1992 conversation with John or the contents of the report (59:8-9, 47-146). In spite of the fact that Detective Tappa never told the jury what John Stuart had said to him in 1992 about the murder of Gary Reagles, the State assumes that if John Stuart's 1992

statement to Detective Tappa had differed in any significant way from his preliminary hearing testimony, Paul J. Stuart's defense counsel would have asked Detective Tappa about the prior inconsistent statement (See State Brief at 20). As such, according to the State, it is reasonable therefore to conclude that John Stuart was testifying truthfully at the preliminary hearing when he said that he gave the same information to the police in 1992 (See State Brief at 20).

Contrary to the State's conclusion, however, the State has made assumptions about John Stuart's alleged 1992 statement which is not supported by the record. On February 18, 1999, when Detective Tappa was asked how he first came into contact with John Stuart and further how that contact came about, the following occurred:

Mr. Bramscher: Judge, I would like the court to monitor very closely what is being said at this point.

The Court: Alright. You can indicate how the contact came about.

A. I stopped him. He was driving a vehicle. I thought he was his brother, Larry Stuart, who we had a warrant for.

Q. Now, did you have a conversation with Mr. Stuart?

A. Yes, I did.

Q. As a result of the conversation, without going into the details of that conversation, did you do something?

A. Yes, I did.

Q. What did you do?

Mr. Bramscher: May we approach the bench?

Q. As a result of that conversation you had with Mr. John Stuart, what did you do?

A. I wrote a report about what I was told and I turned John Stuart over to Detective Kopesky.

Q. And, when you turned John Stuart over to Detective Kopesky, did you happen to be in the same room while John Stuart spoke with Detective Kopesky?

A. Yes. I was briefly.

Q. Now, as a result of that traffic stop for your belief that John Stuart was Larry Stuart, did you prepare a report?

A. Yes, I did.

Q. I am showing you what has been marked State's Exhibit No. 75. Can you identify that document, please?

A. Yes. This is the report that I wrote, and it would have been on September 11, 1992?

Q. And you did memorialize that in -

Mr. Bramscher: May we approach the bench again. please? (59:8-9)

As this Court can clearly see, the substance of the conversation that Detective Tappa had with John Stuart in 1992 was not testified to at trial, nor was the police

report admitted into evidence (50:8-9). It is much more reasonable to assume, therefore, that Paul J. Stuart's trial attorney, Robert Bramscher, was trying to make certain that the contents of that police report was not testified to, nor admitted into evidence when he asked the Court for both a sidebar and for the court to monitor very closely what was being said by Detective Tappa.

It is a much more reasonable assumption that Paul J. Stuart's trial attorney did not ask Detective Tappa questions about the contents of John's 1992 statement because John Stuart had already refused to testify at trial by pleading the Fifth Amendment, and not because it was a truthful statement incapable of impeachment:

> Q. Is the basis for your worry concerning incrimination concerning the fact that if your testimony is different under oath in this courtroom than it was at the time of the preliminary hearing, you would be subjecting yourself to possible charges of perjury?
>
> A. Yes, sir. (48:2).

More importantly, as pointed out in Paul J. Stuart's brief-in-chief, the State is assuming that the police report of Detective Tappa, outlining what John Stuart said to Detective Tappa in 1992, is an obviously reliable statement that could never have been impeached at trial

even if John Stuart had testified at trial. This blanket assumption of the State is exactly what the United States Supreme Court warned of in the most recent case of Crawford v. Washington, 514 U.S. _____, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). As John Stuart was unavailable at trial, and given that his statement to the police in 1992 was "testimonial evidence" as the court in Crawford recently held, the fact that Paul J. Stuart was not able to cross-examine John Stuart at trial as to the 1992 statement, violated Paul J. Stuart's right to confront his accusers as well. See Crawford v. Washington, 541 U.S. ____, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004).

The State is apparently assuming that Paul J. Stuart's defense counsel could never have effectively cross-examined John Stuart at trial regarding his 1992 statement to the police as the statement was obviously reliable,and incapable of impeachment. As the U.S. Supreme Court in Crawford concluded, however, it is not enough to point out that most of the usual safeguards of the adversary process attend a statement when the single safeguard missing is that **which the confrontation clause demands: the right to cross examine one's accusers** (Emphasis added); See Crawford, 541 U.S. _____ at 30. The fact that John Stuart

allegedly gave a statement to the police in 1992, does not mean that John would not have been impeached at trial as the State assumes; instead, it became that much more important for Paul J. Stuart's defense counsel to cross-examine John Stuart at trial regarding both the 1992 statement, and the 1998 statement that he gave to police. The fact that John Stuart gave a statement to the police in 1992, and was not cross-examined as to such statement at trial, does not therefore make his 1998 testimony more reliable, but **instead is the trigger that makes the confrontation clause's demands most urgent, namely the right to confront John Stuart at trial about both the 1992 and 1998 statements he gave to the police.** (Emphasis added) See Crawford, 541 U.S. ____ at 30.

Second, the State claims that Paul J. Stuart would not have been successful in using the 1998 charges against John Stuart to impeach John, as the charges against John had already been resolved prior to John's testimony at the preliminary examination (See State Brief at 21). As stated in the defendant-appellant-petitioner, Paul J. Stuart's brief-in-chief, whether or not the charges were still pending on August 13, 1998 is completely irrelevant. The jury should have known about the circumstances surrounding

John Stuart's statement to detectives on April 21st and June 1st, 1998 which culminated in his preliminary hearing testimony on August 13, 1998. The defendant-appellant-petitioner, Paul J. Stuart, will not repeat those arguments already made in his brief-in-chief, but refers this court to the arguments made on pages 27 through 29 of his brief-in-chief in support of this contention.

Next, the State contends that because the District Attorney's office agreed it would not pursue charges against John Stuart for truthful information he gave regarding Gary Reagles' death, eliciting such information by the defense would not have aided the defense because the theory of the defense was not that John or anyone else killed Mr. Reagles, but that Mr. Reagles committed suicide (See State Brief at 22). The point of Paul J. Stuart's contention,however, is not that the district attorney's office had agreed it would not pursue charges against John Stuart arising from the death of Gary Reagles, but instead is that the State had granted John Stuart immunity for his testimony, and the Illinois State's Attorney had granted John Stuart immunity from a burglary that he had previously committed in return for such testimony (46:62-63; 88;96; Exhibits A-G). Further, that John Stuart continued to

cooperate and gave a statement on June 1, 1998, one day before he was to appear in Kenosha County Circuit Court to enter pleas in a case where he faced 52 years in prison, and that on June 2, 1998, the State filed an amended information which cut John Stuart's exposure from 52 to 12 years. Finally, that John Stuart believed he had a plea agreement with the prosecution, but the prosecution did not honor it (46:62; 63;88;96; Exhibits A-G).

Finally, the State argues that because five other witnesses testified that Paul J. Stuart admitted to the murder, that the admission, therefore, of John Stuart's preliminary hearing testimony was harmless error. However, numerous witnesses also testified for Paul J. Stuart at trial and contradicted some of the witnesses called by the State. One of those witnesses was Miroslav Romanovic who contradicted statements that Paul Stuart had allegedly said, during a Monday night football game, that he had killed Gary Reagles. Mr. Romanovic testified that he never heard Paul Stuart say he had killed Gary Reagles during that game (65:31). Robert J. Landerman III testified that he overheard Mr. Schultz, who previously testified for the State, tell Paul Stuart that he had never signed any

statements implicating Paul Stuart in Reagles' death (65:64). Scott Finley also corroborated Landerman's testimony (65:68-72).

Finally, the State ignores the fact that the State of Wisconsin in their closing argument admitted that the most **important testimony of all came from John Stuart and Art Parramore** (Emphasis added)(67:129-130). As the State emphasized the importance of the witness (John Stuart's) testimony in their case in their closing argument to the jury, and further referred to John's testimony as the most important testimony of all to their case, the error was not harmless. Second, the jury requested that John Stuart and Art Parramoure's testimony be read back to them. Such request was granted by the court (69:7). After having heard the testimony of John Stuart read to them for a second time, the jury returned a guilty verdict (69:8) See Delaware v. Van Arsdale, 475 U.S. at 684.

Further,John Stuart's testimony was not merely cumulative as it was Paul J. Stuart's own brother who was testifying against him; the extent of the cross-examination of John Stuart at the preliminary hearing violated the U.S. Supreme Court's decision in Crawford v. Washington; and, finally, the overall strength of the prosecution's

case was weak as it relied not upon any forensic evidence, but only upon the credibility of the witnesses against Mr. Stuart. It is clear, therefore, that the admission of the preliminary hearing testimony of John Stuart was not harmless error. See Delaware v. Van Arsdale, 475 U.S. at 64. As such, Paul J. Stuart's conviction must be reversed.

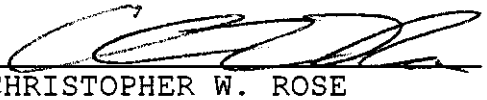
CONCLUSION

For the reasons stated herein, and the reasons stated in the defendant-appellant-petitioner's brief-in-chief, the defendant-appellant-petitioner respectfully requests that this Court reverse his conviction.

Dated this 23rd day of August, 2004.

Respectfully submitted,

ROSE & ROSE
Attorneys for defendant-appellant-petitioner, Paul J. Stuart

By 
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CERTIFICATION

I certify that this Reply Brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is:

> Typewritten (pica, 10 spaces per inch, non-Proportional font, double-spaced, 1-1/2 inch margins on left and 1 inch on other three sides)

The length of the Brief is 12 pages.

Dated this 23rd day of August, 2004.

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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 01-1345-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

PAUL J. STUART,

Defendant-Appellant. - Petitioner

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL S. FISHER, PRESIDING

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STATEMENT OF THE CASE AND FACTS

The Court of Appeals decision in State v. Stuart, 2003 WI 73, 262 Wis. 2d 620, 664 N.W.2d 82 and the Defendant-Appellant's brief adequately summarize the procedural history and facts of the case. Any additional facts relevant to the argument herein will be cited to in the brief.

ARGUMENT

Crawford Should be Applied Retroactively to this Case

The Confrontation Clause of United States Constitution provides a procedural guarantee to ensure reliability of the evidence used against a defendant at trial: the ability to confront, via cross-examination, the defendant's accusers. Crawford v. Washington, 541 U.S. ____ at 26 (2004). There is no substitute for this right. Id. at 33.

New rules of criminal procedure are applied retroactively when a case is on direct appeal. State v. Lagundoye, 2004 WI 4, 268 Wis. 2d 77, 674 N.W.2d 526. It is undisputed that the instant case is on direct appeal. The government has conceded that Crawford applies.

Crawford prohibits the admissibility of John Stuart's preliminary hearing testimony

As discussed above, Crawford allows no substitute for actual confrontation of testimonial evidence against a defendant. Confrontation is defined as the ability

to **meaningfully** cross examine those who bear testimony against the accused. Crawford at 15, 21-22. Testimony is defined as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford at 15 (citation omitted). The Crawford Court goes on to list the core class of "testimonial" statements: affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, pretrial statements that the declarant would reasonably expect to be used prosecutorially, depositions, confessions, and statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Id. at 15-16.

Although the Court declined to specify exactly what would constitute testimonial evidence, it clearly and unequivocally stated: [w]hatever else the term covers, it applies at a minimum to **prior testimony at a preliminary hearing**, before a grand jury, or at a former trial; and to police interrogations. Id. at 33 (emphasis added). It is clear that the prior cross examination of a government witness to be afforded the defendant under the confrontation clause must be substantially similar to the cross examination normally afforded to the defendant at trial. The whole purpose for the requirement of cross examination is to assist the trier of fact in determining the reliability of the evidence. Id. at 26.

In this case, the ability of the jury to determine the reliability of John Stuart's preliminary hearing testimony was woefully inadequate. Because Mr. Stuart was not available for cross examination at trial, the defense was unable to

question him as to any potential bias on his part. While the Court of Appeals held that because the charges against John Stuart had been resolved at the time of the preliminary hearing, they provided no basis for him to give untruthful testimony, that conclusion is direct conflict with State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80 (1976). In Lenarchick, this Court held that defendant's counsel had not only right, but a **duty** to cross examine a witness about a charge which had been dismissed against the witness prior to the witness' testimony, even though no promises had been made by the government to the witness. Id. at 446-447.

There is no basis on which to distinguish the facts in Lenarchick from the facts here. In fact, John Stuart had even more motive to testify favorably for the government than the witness in Lenarchick. He had an immunity agreement with the prosecution, several of his charges magically went away once he began to cooperate with the government, and he got immunity for a burglary in Illinois. In Lenarchick, a mere speculative assumption that the witness **may** have testified favorably for the government in the "absurd" hope that the government would dismiss charges against him was considered an ingredient of meaningful cross examination.

The defendant was not permitted to cross examine John Stuart in any meaningful way about his credibility or his motives for testifying. As a matter of law, the defendant cannot cross examine any witness at a preliminary hearing about any facts that bear solely on credibility – ironically the most important determination to be made by the trier of fact, simply, whom do you believe? In

this case, the record happens to establish that defense counsel attempted to ask credibility questions, the prosecutor objected, and the objections were sustained. Therefore, his right to confrontation with respect to that witness was violated. The government has conceded as much.

The Error was not Harmless

An error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." State v. Harvey, 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189. The government has not met its burden on this issue. The most persuasive evidence of this is what happened at the jury trial itself: the majority of the witnesses against the defendant testified on February 17, 1999; only John Stuart's testimony came in later, on February 25, 1999; the jury began deliberating on February 25, 1999; on February 26, 1999, the jury wanted the testimony of only two witnesses, Art Parramoure and John Stuart. It is clear that the testimony of these two witnesses was given great weight by the jury. While asking to have Mr. Parramoure's testimony read back to them could have been a function of the break taken in the middle of the trial, the fact that they want John Stuart's testimony read back to them cannot be attributed to memory loss. His testimony was one of the most recent witnesses heard by them.

Furthermore, the government agreed with the jury at the time of trial: it argued to the jury that the "most important evidence all came in through John Stuart's testimony and Art Parramoure's testimony." (66:129) The government and the jury were actually present at trial. They were in the best position to

determine which evidence should be relied on most heavily. And they both apparently agreed: the testimony of Art Parramoure and John Stuart were the most important. In addition, the jury is told that the number of witnesses on each side is irrelevant. Instead, one witness may be more credible than all the rest. What would be more credible than one brother testifying against another? The fact that the admission supposedly came the day after the murder and before it was even discovered makes it even more credible.

The heavy reliance place upon the fact that John Stuart first tried to blame his brother for the murder in 1992 is much ado about nothing. First and foremost, the defense was never able to cross examine John Stuart about the events surrounding the 1992 statement. It appears as though John was stopped for a speeding violation and sua sponte gave up his brother for a homicide. That's patently unbelievable. At the preliminary hearing, defense counsel was never able to get into the reasons for John's 1992 statement. The government's objections were overruled. We do know that John Stuart had been involved in a robbery only a week before that traffic stop. He may have panicked and sought to give the police information to avoid a conviction on the burglary. Not a far-fetched idea, considering that John Stuart later brokered that deal on his behalf in 1998.

In addition, there is more evidence to support the belief that John Stuart's 1992 statement was widely different from his 1998 preliminary hearing testimony than there is to support the idea that it was substantially similar. No prosecution was commenced until after the information given to authorities in 1998. The 1992

statement must have been considered and rejected as a basis for prosecution. It's implausible that it was simply ignored. And most tellingly, the May 12, 1998, letter to John Stuart's attorney from the Kenosha County Assistant District Attorney assigned to the case states, "we do believe he knows much more about the crime than he has told law enforcement to date." That must have been the case, because in 1998, Paul Stuart was charged with first degree intentional homicide – 6 years after John Stuart's supposedly identical statement.

Like the game of Clue, John Stuart's unconfronted preliminary hearing testimony told the jury who did it, where, and with what weapon. But it did much more than that: it gave a level of detail that no other government witnesses were able to provide. And it was able to do so virtually unimpeached. The jury was not able to make any real determination of John Stuart's credibility because it never met John Stuart. It only heard words on a page read to them by a person that we are all trained from childhood to implicitly trust and believe: a police officer who was no doubt in full military uniform. That was a direct violation of the defendant's right to confrontation and cannot possibly be considered harmless error.

CONCLUSION

The decision of court of appeals should be affirmed for the reasons stated above.

Dated at Madison, Wisconsin, September 7, 2004.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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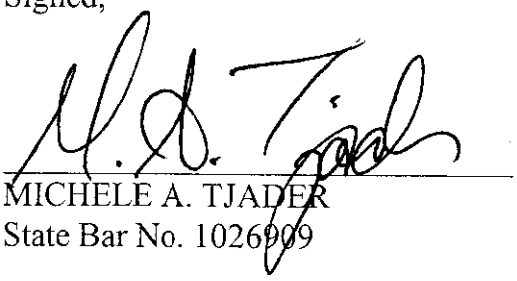
Dated: September 7, 2004.

Signed,



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